SUPREME COURT, U.S.
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No. 05-670

IN THE

Supreme Court of the United States

ROBERT BRUCE CRAFT,

Petitioner,

v.

CALVIN D. MORTON, Warden, and James Donald, COMMISSIONER OF THE GEORGIA DEPARTMENT OF CORRECTIONS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, in child pornography prosecutions, courts are required to perform independent examinations of whether material alleged to be child pornography is constitutionally protected speech.

2. Whether the category of speech unprotected by the First Amendment and subject to prosecution as child pornography is limited to pictures that are either objectively pornographic in themselves or the product of child abuse.

3. Whether the First Amendment protects defendants in child pornography prosecutions from conviction and punishment premised upon speculation about their private thoughts and fantasies.

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Dr. Robert Bruce Craft, the petitioner, respectfully requests that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The order of the United States Circuit Court of Appeals for the Eleventh Circuit denying a certificate of appealability (App. A), the order of the United States District Court for the Southern District of Georgia denying a COA (App. B), the order of the District Court adopting the report and recommendation of the Magistrate Judge (App. C), the Order of the Magistrate Judge (App. D), and the report and recommendation of the Magistrate Judge (App. E) were not officially reported.

The opinion of the Court of Appeals of Georgia is reported at *Craft v. State*, 252 Ga. App. 834, 558 S.E.2d 18 (2001) (App. F). The order denying reconsideration will not be officially reported. (App. G). The denial of certiorari by the Supreme Court of Georgia in *Craft v. State*, Case number S02C0654, has not been officially reported, but may be found at 2002 Ga. LEXIS 418 (App. H). The denial of reconsideration from denial of certiorari will not be officially reported. (App. I). The trial court entered no published opinions in *State v. Craft*, Richmond County Superior Court Indictment Number 99-RCCR-50, Columbia County Superior Court Indictment Number 99-CR-931 (consolidated by consent).

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals of Georgia was entered on November 9, 2001. The Georgia Court of Appeals denied a timely motion for reconsideration on December 10,

2001. The Supreme Court of Georgia denied timely cross-petitions for certiorari from both parties, by a vote of four to three, on May 13, 2002. The Georgia Supreme Court denied Craft's timely motion for reconsideration, by the same vote, on June 7, 2002. This Court denied Craft's timely petition for certiorari on November 12, 2002.

Craft filed a petition for habeas corpus in the United States District Court for the Southern District of Georgia on September 19, 2003. A Magistrate Judge recommended denial of Craft's habeas petition on December 8, 2004. Rejecting Craft's timely objections, the District Court adopted the Magistrate Judge's report and recommendation and denied the petition on March 15, 2005. The District Court denied Craft's timely motion to alter and amend and his timely application for a certificate of appealability on April 20, 2005 and June 28, 2005, respectively. The United States Court of Appeals for the Eleventh Circuit denied his timely application for a certificate of appealability on August 24, 2005.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1). This Court has jurisdiction under §1254 (1) to review denials of applications for certificates of appealability. *Hohn v. United States*, 524 U.S. 236 (1998).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States provides, in relevant part, "Congress shall make no law . . . abridging freedom of speech. . . ."

The Fifth Amendment to the Constitution of the United States provides, in relevant part, "No person shall . . . be deprived of life, liberty or property without due process of law. . . ."

The Fourteenth Amendment to the Constitution of the United States provides, in relevant part, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States. . . ."

As to habeas corpus appeals, the United States Code, 28 U.S.C.A. § 2253 (c), provides in relevant part,

> (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from —
>
> > (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; ...
>
> (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

Georgia's child molestation statute, O.C.G.A. § 16-6-4, provides, in relevant part,

> (a) A person commits the offense of child molestation when he or she does any immoral or indecent act to or in the presence of or with any child under the age of 16 years with the intent to arouse or satisfy the sexual desires of either the child or the person.

Georgia's child exploitation statute, O.C.G.A. § 16-12-100, provides, in relevant part,

> (a) As used in this Code section, the term . . . (4) "Sexually explicit conduct" means actual or

> simulated: . . . (C) Masturbation; (D) Lewd exhibition of the genitals or pubic area of any person; [or] . . . (H) Defecation or urination for the purpose of sexual stimulation of the viewer; . . .
>
> (b)(5) It is unlawful for any person knowingly to create, reproduce, publish, promote, sell, distribute, give, exhibit, or possess with intent to sell or distribute any visual medium which depicts a minor engaged in any sexually explicit conduct. . . .
>
> (7) It is unlawful for any person knowingly to bring or cause to be brought into this state any material which depicts a minor engaged in any sexually explicit conduct.
>
> (8) It is unlawful for any person knowingly to possess or control any material which depicts a minor engaged in any sexually explicit conduct.

STATEMENT OF THE CASE

When this Court first recognized child pornography as a category of speech unprotected by the first Amendment, it did so because child pornography is a product of child abuse and because circulation of child pornography is an ongoing injury to the children depicted. *New York v. Ferber*, 458 U.S. 747 (1982). Implicit in that rational are limitations on the types of material that may be criminalized. Since *Ferber* was handed down, however, the definition of child pornography has been expanding. That expansion has become a threat to valuable protected speech. The greatest threat is practice of criminalizing speech on the basis of speculation regarding a defendant's thoughts and fantasies. The convictions at issue rest on such speculation.

The courts below have disregarded the First Amendment. They have affirmed child-pornography convictions for pictures that include toddlers romping unclothed – pictures that the Georgia Court of Appeals acknowledges to be indistinguishable from those of a naked toddler on a bear rug. (App. G at 78a-79a). Although none of the pictures at issue are in any way sexual, Craft has been denied an independent examination on appeal of the question whether the pictures are lewd. This Court has held that the First Amendment requires such an independent examination. *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 507-508 (1984); *New York v. Ferber*, 458 U.S. 747, 774, n.28 (1982).

The courts below have further held – contrary to the Due Process clause, as well as the First Amendment – that innocuous photographs can be transformed into child pornography by a "lustful disposition" on the part of the photographer, which may be proved by "exceedingly weak and unsatisfactory evidence." (App. F at 68a) In other words, if a jury disapproves of "the moral content of [a photographer's] thoughts," the photographer can be convicted as a child pornographer; and there is no meaningful appellate review. Cf. *Stanley v. Georgia*, 394 U.S. 557, 565 (1972); *see also Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002).

The Court of Appeals reversed most of Craft's convictions. But it did so only on the basis of constraints in "the precise language" of Georgia's exploitation statute, O.C.G.A. 16-12-100. (App. F at 64a). Georgia's exploitation statue was crafted to deal with child pornography and to comply with the dictates of *New York v. Ferber*, 458 U.S. 747 (1982) and *Osborne v. Ohio*, 495 U.S. 103 (1990). But the Georgia Court of Appeals went on to affirm convictions

under Georgia's general molestation statute, O.C.G.A. § 16-6-4, for pictures that do not even arguably fall under the exploitation statute – thereby inviting prosecutors to avoid the constraints of the exploitation statue and of the decisions of this Court in future by using the general molestation statute instead. The Court of Appeals rejected the proposition that additional constraints flow from the Constitution of the United States or the decisions of this Court. (App. G at 78a-79a).

Craft challenged the decision of the Georgia Court of Appeals by petitioning for certiorari from the Supreme Court of Georgia – which denied the petition by a vote of four-to-three (App. H at 80a) – and then from this Court. After this Court denied certiorari, Craft reasserted his Constitutional claims by petitioning for habeas corpus in the United States District Court for the Southern District of Georgia.

Craft's habeas petition rested on three grounds. First, Craft's First Amendment rights were violated by the state courts' decision to criminalize protected speech. Second, Craft's Due Process rights were violated by the state courts' decision that lascivious intent, an essential element of the crimes for which he has been convicted, can be inferred from "evidence which is exceedingly weak and unsatisfactory." The third ground, which is not at issue in this petition for certiorari, challenged the sufficiency of the evidence as to Craft's three convictions that are not founded upon pictures. *See* footnote 1, infra.

Adopting the report and recommendation of a Magistrate Judge, the District Court denied the petition. Thereafter, he denied Craft's request for a certificate of appealability. The United States Circuit Court of Appeals for the Eleventh Circuit likewise refused to issue a COA.

The District Court explained his refusal to issue a COA only by referring generally to the Magistrate Judge's lengthy report and recommendation (App. E at 15a-51a), which the District Court had adopted. (App. B at 2a-3a). The Circuit Court's explanation of its refusal to grant a COA consisted only of a recitation of the required showing and an unexplained holding that Craft had failed to make that showing. (App. A at 1a).

A. Removal of procedural bars

The Georgia Court of Appeals ignored Craft's First Amendment claim in its published opinion. But in a subsequent order denying his motion for reconsideration, it expressly addressed and rejected his First Amendment claim on the merits. (App. G at 78a-79a) (distinguishing *Osborne v. Ohio*, 495 U.S. 103, 127 (1990)).

The Georgia Court of Appeals could have refused to reach the merits of Craft's First Amendment claim: Craft had omitted it from his opening brief and raised it for the first time in a request for leave to file a supplemental brief. The Georgia Court of Appeals could have treated that omission as a procedural bar. *Burke v. State*, 153 Ga.App. 769,770, 266 S.E.2d 549, 550 (1980) *but see Hall v. State*, 162 Ga.App. 713, 716, 293 S.E.2d 862, 865 (1982) (leniency where a fundamental right was at issue). Instead of treating the issue as barred, however, the Georgia Court of Appeals entered an order authorizing the supplemental brief and later addressed the First Amendment issue on its merits.

As to Due Process, the Georgia Court of Appeals expressly undertook to test the sufficiency of the evidence in accordance with the standard set out in *Jackson v. Virginia*, 443 U.S. 307, 313 (1979). (App F at 60a). In *Jackson*, this Court explicated the Due Process standard. *Id.*, 443 U.S. at

313. The proposition that lasciviousness can be inferred from "weak and unsatisfactory" evidence appears for the first time in the decision of the Georgia Court of Appeals. (App F at 68a).

"If the last state court to be presented with a particular federal claim reaches the merits, it removes any bar to federal-court review that might otherwise have been available." *Ylst v. Nunnemaker*, 501 U.S. 797, 801 (1991). When the Georgia Supreme Court was presented with Craft's First Amendment argument, it denied certiorari in an unexplained order. (App H at 80a). "Where there has been one reasoned state judgment rejecting a federal claim, later unexplained orders upholding that judgment or rejecting the same claim rest upon the same ground." *Ylst*, 501 U.S. at 803. Consequently the state courts have removed any bar that might have existed to federal-court review of Craft's First Amendment claim. Nevertheless, the lower federal courts refused to follow *Ylst*. (App E at 31a, dismissing *Ylst* in a subordinate clause as "a case decided before the enactment of the [Anti-terrorism and Effective Death Penalty Act]"; App. C at 5a-6a) and instead set up a variety of procedural bars that the state courts might have imposed. (App. E at 23a-34a, 42a-44a; App. C at 5a-9a).

B. Investigation and prosecution

Craft came to the attention of law enforcement when a photo lab reported a series of pictures of one of Craft's child psychology patients. Those pictures are disturbing. They depict the child playing at mutilating his genitals with a toy knife. But the child's behavior, while unsettling, was not sexual. Much was made of Craft's failure to articulate to the investigating officer a satisfactory explanation for his

decision to photograph that behavior. But deliberation before snapping the shutter is antithetical to photography. Photographers often must act quickly. Moreover, Craft, who believed the child to be abused, had a duty to be interested in the behavior. Although he had not formulated a therapeutic purpose when he snapped the shutter, Craft had intended to treat the pictures like client confidences. (App. F at 55a-56a).

There is no evidence that Craft engaged in any inappropriate use or distribution of any of the subject pictures. (See App. F at 55a-56a). Most of the hundreds of pictures at issue were among tens of thousands put back in developers' envelopes and piled up around Craft's home. (See App. F at 58a). Only two of the subject pictures, a sequence depicting a child climbing a wall in a public park – for which he was acquitted on appeal – were among those Craft selected for display.

After the investigator met with Craft, he secured a warrant and seized approximately 37,000 photographs from Craft's home and office. (App. F at 58a). Two more searches followed. (App. F at 58a-59a). At trial, the prosecutor estimated that Craft had taken a total of 70,000 photographs. The state selected 616 for use at trial. (See App. F at 69a). The investigating officer testified that, apart from a few duplicates, the photographs that the state chose not to introduce were unobjectionable. The selection process was time consuming: the interval between the first search and Craft's arrest was a year and five months (App. F at 58a-59a); another ten months passed before indictment.

C. Indictment, evidence and trial

Craft was charged with 103 counts of child exploitation and 15 counts of molestation. (App. F at 53a, 59a-60a). All

of the exploitation counts and twelve[1] of the molestation counts are for picture-taking — two videotapes, the rest photographs. Copies of the photographs associated with convictions that have been upheld are attached. (App. J). The case was tried to a judge. Craft presented no evidence at trial. While his habeas petition was pending in District Court however, Craft filed a declaration from his wife. (App. K). She testified that the photographs at issue were selected from tens of thousands that Craft placed back in developers' envelopes and left lying about the house, not from among the very few that he selected for framing and other special treatment. (App. K at 135a). She attached examples of the latter, along with published examples of mainstream, non-sexual portrayals of nude children. (App. K at 135a-136a).

With the exception of a single exploitation count, which contained a typographical error, Craft was convicted on all counts. (App. F at 59a-60a). Craft was sentenced to concurrent twenty-year terms of incarceration for each of the exploitation convictions and concurrent twenty-year terms on probation for each of the molestation convictions.

Most of the convictions rest on the "lewd exhibition of the genitals" prong of the exploitation statute, O.C.G.A. § 16-12-100(a)(4)(D). As to those charges, the state expressly

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1. Three molestation convictions, which are not subjects of this petition, are based on the testimony of F.R. the only child depicted in the photographs who testified. F.R. had been fond of Craft until an FBI agent told F.R. that Craft had molested a many children and that F.R.'s testimony could help put Craft in prison. After this interview, F.R. recovered certain memories, which provided the basis for those three convictions. One of those convictions was for videotaping F.R. while he masturbated, but no such videotape, nor anything like such a videotape, was found among the truckloads of material seized from Craft's home.

argued that any photograph depicting any portion of a child's genitals is unlawful.

Other convictions rest on other prongs of the exploitation statute, notably "[d]efecation or urination for the purpose of sexual stimulation of the viewer." O.C.G.A. § 16-12-100(a)(4)(H). Those pictures do not involve scatological eroticism. They include fully-clothed boys urinating in the woods, photographed from behind, and a photograph of a child sitting on a toilet, with no part of his genitals or anus visible, making a comical face. (See App. F at 65a, 66a; App. J at 89a, 95a-97a).

Several convictions are for photographs to which no prong of the exploitation statute is even arguably applicable. Those photographs are nudes of children positioned so that their genitals are not visible. (App. J at 84a-88a). But for the adjudication that they are child pornography, it would be difficult to imagine any forum in which their display would be inappropriate. As to these, the state invoked the general molestation statue, O.C.G.A. § 16-6-4.

D. Decision of the Court of Appeals of Georgia

The Court of Appeals of Georgia gave short shrift to the First Amendment by applying an inappropriately deferential standard of review. The Court of Appeals did reverse 67 of the exploitation convictions. But the basis for those reversals was not the First Amendment. Instead, the Court of Appeals looked only to "the precise language" of Georgia's exploitation statute. (App. F at 64a). The Court of Appeals refused to recognize any additional constraints arising from the Constitution of the United States or the decisions of this Court. (App. G at 78a-79b).

In the seminal case

> identifying a new category of unprotected expression — child pornography — the Court expressly anticipated that an "independent examination" of the alleged!y unprotected material may be necessary "to assure ourselves that the judgment 'does not constitute a forbidden intrusion on the field of free expression.'" *New York v. Ferber*, 458 U.S., at 774, n. 28 (quoting *New York Times Co. v. Sullivan*, 376 U.S., at 285).

Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 507-508 (1984).

Notwithstanding that requirement, the Court of Appeals applied the "any evidence" standard of review. (App. F at 62a). Under that standard, findings of fact "will not be disturbed if there is any evidence to support them." (App. F at 62a) (citation omitted). The any-evidence standard is equivalent in Georgia to the clearly-erroneous standard. *Hall v. Ault*, 240 Ga. 585, 242 S.E.2d 101 (1978). Although any-evidence review resulted in some reversals, it is too deferential to satisfy this Court's requirement of an independent examination. See *Jenkins v. Georgia*, 418 U.S. 153, 160 (1974) (overturning "the Supreme Court of Georgia's apparent conclusion that the jury's verdict against appellant virtually precluded all further appellate review of appellant's assertion that his exhibition of the film [*Carnal Knowledge*] was protected by the First and Fourteenth Amendments.")

Because it was applying the any-evidence standard of review, the Court of Appeals refused to adopt the standard set out in *United States v. Dost*, 636 F. Supp. 828 (S.D.Cal. 1986), *aff'd sub nom. United States v. Wiegand*, 812 F.2d 1239 (9th Cir. 1987). (App. A at 10a). In *Dost*, the district

court construed the federal exploitation statute, which had been amended "in line with the *Ferber* holding." *Dost*, 636 F. Supp. at 832, discussing, *New York v. Ferber*, 458 U.S. 747 (1982). The federal statute construed in *Dost* is similar to the Georgia statute at issue. Cf. O.C.G.A. § 16-12-100 with 636 F. Supp. at 830. Nevertheless, the Georgia Court of Appeals dismissed *Dost* as a case that merely, "interprets California law (sic), and thus is not controlling authority." (App. F at 61).

The *Dost* Court undertook to flesh out this Court's requirement of an independent examination. It did "not presume to create a comprehensive definition of either lewdness or lasciviousness." Instead it held that "the lascivious exhibition' determination must be made on a case-by-case basis" and identified six "general principles" it deemed useful as "guides for analysis."[2] *Dost*, 636 F. Supp.

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2. Because of the sexual innocence of children, that which constitutes a 'lascivious exhibition' of a child's genitals will be different from that of a 'lascivious or lewd exhibition' of an adult's genitals. . . . A child of very tender years, because of his innocence in matters sexual, would presumably be incapable of exuding sexual coyness. Sexual coyness is an expression outside the young child's range of experience.

Instead this Court feels that, in determining whether a visual depiction of a minor constitutes a "lascivious exhibition of the genitals or pubic area" under § 2255(2)(E), the trier of fact should look to the following factors, among any others that may be relevant in the particular case:

(Cont'd)

at 832. *Dost* has been widely adopted. Of the numerous jurisdictions that have considered the *Dost* standards, Georgia is apparently the first to decline to follow them. *See* Adler, *The Perverse Law of Child Pornography*, 101 Colum. L.Rev. 209, 261, n.291 (2001) ("I have not found a single case in any jurisdiction in which a court mentions the *Dost* factors and declines to follow them.").

(Cont'd)

> 1) whether the focal point of the visual depiction is on the child's genitalia or pubic area;
>
> 2) whether the setting of the visual depiction is sexually suggestive, i.e., in a place or pose generally associated with sexual activity;
>
> 3) whether the child is depicted in an unnatural pose, or in inappropriate attire, considering the age of the child;
>
> 4) whether the child is fully or partially clothed, or nude;
>
> 5) whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity;
>
> 6) whether the visual depiction is intended or designed to elicit a sexual response in the viewer.
>
> Of course, a visual depiction need not involve all of these factors to be a 'lascivious exhibition of the genitals or pubic area'. The determination will have to be made based on the overall content of the visual depiction, taking into account the age of the minor.

United States v. Dost, 636 F. Supp. 828, 832 (S.D.Ca.) (footnotes omitted).

Having rejected *Dost* in favor of any-evidence review and having refused to construct its analysis on any constitutional foundation, the Georgia Court of Appeals founded its analysis on the specific language of the statues under which Craft was charged. It applied the any-evidence standard of review in three different ways: one way for the lewd-exhibition-of-the-genitals counts, another for the other exploitation counts, and a third for the molestation counts.

Applying the any-evidence standard to the lewd-exhibition-of-genitals counts, the Georgia Court of Appeals recognized that, even under that deferential standard of review, "lewd exhibition" had to be proven. It reversed a number of counts on the basis that, while the child's genitals were partially or fully visible, there was no evidence of lewd exhibition. The bulk of those reversed counts are for whole-body pictures of fully clothed children sitting on the floor. (App. F at 63a).

Those reversals notwithstanding, any-evidence review was excessively deferential. Many convictions were upheld notwithstanding that none of the pictures are sexual. For example, convictions for two photographs involving pictures of a little girl "shown nude and in the process of taking off her clothes" were upheld with a conclusory declaration that the evidence was sufficient. (App. F at 63a, *see also* App. J at 93a).

As to the counts charged under other prongs of the exploitation statute, the Court of Appeals applied the any-evidence standard of review in an even more deferential way. Because there is no lewd-exhibition provision in those other prongs of the statute, the Court of Appeals did not inquire whether the pictures were lewd. It did require that the photographs portray what the state alleged they portray.

(App. F at 63a, 64a-65a) (overturning convictions because photographs the state alleged to portray masturbation do not portray masturbation).

But any-evidence review of those other prongs of the exploitation statue required little else. As indicated above, the photographs charged under the defecation-or-urination prong of the exploitation statute do not remotely portray scatological eroticism. Nevertheless, the Court of Appeals upheld those convictions. (App. F at 65a, 66a). That prong does require that the portrayal be "for the sexual stimulation of the viewer." But the Court of Appeals construed that requirement to mean only that the state must prove "[i]ntent, which is a mental attitude, . . . commonly detectable only inferentially. . . ." (App F at 66a-67a). Intent, the Court of Appeals went on to hold, can be inferred from, "evidence which is exceedingly weak and unsatisfactory." (App. F at 68a). The Court of Appeals deemed the evidence of intent sufficient to authorize the fact finder to impute to Craft a "lustful disposition." (App. F at 69, G at 79a).

As to the counts charged under the general molestation statute, any-evidence review was still more deferential. Again, the Court of Appeals applied any-evidence review to the fact finder's determination that Craft lusted in his heart. (App. F at 67a-68a). But, as to the content of the pictures, any-evidence review meant no review. The Court of Appeals held that the molestation statute's "indecent act" requirement (O.C.G.A. § 16-6-4) is satisfied by pictures of nude children in which the child's genitals are not visible — including pictures which the Court of Appeals acknowledged to be indistinguishable from the traditional image of a small child on a bearskin rug. (App. F at 67a-69a, G at 78a-79a, *see also* App. J. at 84a-88a).

Georgia's exploitation statute is consistent with the direction this Court gave in *New York v. Ferber*, 458 U.S. 747, 764, 773 (1982). Under the reasoning of the Court of Appeals, such exploitation statutes, with their defined proscriptions, are surplusage. Under a general molestation statute, there are no limits to the types of pictures that can be used to charge child pornography.

The Constitution of the United States and the decisions of this Court say otherwise.

REASONS FOR GRANTING THE PETITION

I. The writ should be granted because child pornography law has come to threaten a vast array of innocent and valuable depictions of children.

The current state of child pornography law threatens every person who takes or possesses a picture of a child. Child pornography has become a thought crime.

The decision of the Georgia Court of Appeals abdicates to fact finders the courts' responsibility to construe molestation and exploitation statutes in harmony with the First Amendment to the Constitution of the United States. The decision recognizes no Constitutional constraints on the type of speech that may be criminalized if there is "any evidence" (App. F at 62a), however "weak and unsatisfactory" (App. A at 68a), of "lustful disposition." (App. A at 69a).

Under that standard – or lack of standard – no picture of a child is entirely safe. Pedophiles can find any picture of children erotic. Adler, *Inverting the First Amendment*, 149 U.Pa.L.Rev. 921, 945, n.108 (2001).

Child pornography "law has come to threaten a vast array of innocent and valuable depictions of children." Adler, *Inverting the First Amendment*, 149 U. Pa. L.Rev. 921, 927 (2001). Adler demonstrates in detail that the expanding definition of child pornography is a threat to free speech, that the definition of child pornography has become unmoored from its central rational (protecting children who are injured in its creation or by its distribution), and that child pornography law is undermining the distinctions between speech and action and between thought and action.

The present case is one of a number of recent child-pornography prosecutions for photographs that portray nudity without more. *See e.g. State v. Rendleman*, 134 N.M. 744, 756, ¶ 39, 82 P.3d 554, 566 (2003) ("[T]he State asserts that photos of naked children with bare buttocks or genitals merely visible fall within the Act if a jury could find there was a sexual purpose behind the photo.") In *Rendleman* the appellate court purported to apply a state constitution which had been interpreted "to provide broader protection than the First Amendment." 134 N.M. at 759, ¶ 52, 82 P.3d at 569. At issue in *Rendlemen* were a series of photographs of substantial artistic merit, which the court found to reflect "the predominant theme of primitivism and connection between organic and inorganic form." 134 N.M. at 765, ¶ 82, 82 P.3d at 575. The analysis set out in *Rendleman* seems to reflect an acute sensitivity to the free speech problems inherent in child pornography prosecutions. But *Rendleman* ultimately allows prosecution to go forward for a set of photos in which children's "genitalia is fully exposed, if not 'exhibited,'" because "a rational juror might find they were designed to appeal to prurient interests or that they are patently offensive and that the other photos were merely a pretext or cover for obscene material." *Id.*

The present case depends upon similar speculation and is particularly threatening to protected speech because of the state's activist role in creating the facts upon which Craft's convictions rests. The Court of Appeals held that lascivious intent can be inferred from the "hundreds of photographs of nude or partially nude children or their genitalia [which] were admitted into evidence." (App. G. at 79a). As to the approximately 70,000 of admittedly innocuous photographs from which those hundreds were painstakingly selected, the Court of Appeals held, "The court is not constrained to view as a whole evidence pertaining to sexual portrayals of children." (App. F at 75a).

This exercise in divining what Craft may have been fantasizing about confuses the prosecutor's preoccupation with the defendant's. An art gallery at which each nude is surrounded by a hundred pictures of other types would be a very different place from a gallery displaying only hundreds of nudes. The former is what prosecutors found, the latter is what they presented at trial. In fact, only two of the charges were for pictures Craft selected for display — and those convictions were reversed. The state built its case out of Craft's discards.

This exercise also ignores what a photographer must do in order to accumulate 70,000 pictures: he must take pictures indiscriminately. Photographers often "shoot a lot of film (the least expensive part of photography) in the hope of catching that one really special moment. . . ." Marion Rubin, Naked Truths 37 (2002). The teaching of the decision below is that, whenever a child may appear in the frame, photographers must pause before each snap of the shutter to assure that nothing will be captured that cannot be easily explained to a skeptical police officer.

But reported appellate decisions are not the principal or immediate source of the chill created by child pornography law. Prosecutions that ought to be stopped dead by the First Amendment do not often find their way to the appellate courts. They are generally plea bargained. The long prison sentences for child pornography make plea offers in such cases all but irresistible. *See* Marion Rubin, Naked Truths 48-59 (2002) (describing the author's reluctant agreement to pretrial intervention in order to avoid trial for taking nude photographs of her grandchildren and summarizing six other similar cases); *see also* Adler *supra*, at 964-965, notes 191-196 (citing a newspaper article that warns, "Remember those cute baby pictures you took with your child naked in the bathtub? You'd better burn them, or the pornography police might get you," along with ten similar articles.)

Former child sex-crimes prosecutor Bruce Taylor has issued a similar warning. "[P]arents should not 'take pictures of kids under 18, who you know aren't fully clothed . . . If you do take pictures, you really have to be prepared to defend yourself in any courtroom in the country in front of 12 jurors." ABC News.com, Shutterbugs Beware (Aug. 13, 2001) < http://web.archive.org/web/20011221225854/http://abcnews.go.com/sections/Downtown/2020/Downtown_010813_photolabs.html >. (Taylor was a federal prosecutor with the U.S. Department of Justice and was involved in more than 700 obscenity cases; he claims to have handled more such cases than any other prosecutor. Frontline, American Porn, Interview Bruce Taylor < http://www.pbs.org/wgbh/pages/frontline/shows/porn/interviews/taylor.html >.)

Those warnings are contrary to the decisions of this Court and contrary to the First Amendment. In *New York v. Ferber*, the seminal child-pornography case, this Court held that there is no constitutional protection for speech that entails

exploitation of children, but also held that child pornography may not be so defined as to criminalize protected speech. *New York v. Ferber*, 458 U.S. 747, 764, 773 (1982). *Ferber* holds,

> There are, of course, limits on the category of child pornography which, like obscenity, is unprotected by the First Amendment. As with all legislation in this sensitive area, the conduct to be prohibited must be adequately defined by the applicable state law, as written or authoritatively construed. Here the nature of the harm to be combated requires that the state offense be limited to works that visually depict sexual conduct by children below a specified age. The category of "sexual conduct" proscribed must also be suitably limited and described.

458 U.S. at 764.

Later this Court reaffirmed that, even as to children, "depictions of nudity, without more, constitute protected expression." *Osborne v. Ohio*, 495 U.S. 103, 112 (1990).

The same reasoning that precludes an expansive construction of "lewd exhibition of the genitals" also precludes expansive construction of other prongs of an exploitation statute. This Court has rejected the idea that a "distinction between body areas and specific body parts is constitutionally significant. The crucial question is whether the depiction is lewd, not whether the depiction happens to focus on the genitals or the buttocks." *Osborne v. Ohio*, 495 U.S. 103, 114, n.11 (1990).

Rejecting the overbreadth argument before it, the *Ferber* Court wrote, "Nor will we assume that the New York courts

will widen the possibly invalid reach of the statute by giving an expansive construction to the proscription on 'lewd exhibition[s] of the genitals.'" 458 U.S. at 773. That expectation has proven overly optimistic. The writ should be granted in order to provide direction as to the outer boundaries of what may be treated as unprotected speech.

II. The writ should be granted in order to affirmatively set out the requirement that courts perform an independent examination of whether material alleged to be child pornography is constitutionally protected speech.

The *Ferber* Court acknowledged the requirement of an independent examination, but held that no such examination was necessary on that occasion. The material at issue in *Ferber* was hard core, "films devoted almost exclusively to depicting young boys masturbating." 458 U.S. at 752. This Court held,

> "There is no argument that the films sold by respondent do not fall squarely within the category of activity we have defined as unprotected. Therefore, no independent examination of the material is necessary to assure ourselves that the judgment here 'does not constitute a forbidden intrusion on the field of free expression.' *New York Times Co. v. Sullivan*, 376 U.S. 254, 285, 84 S.Ct. 710, 728, 11 L.Ed.2d 686 (1964)."

Ferber, 458 U.S. at 774, n.28.

The strongest affirmative authority for the independent-examination requirement is a defamation case, which does reaffirm *Ferber*. In that case, this Court adopted the language of an earlier concurring and dissenting opinion by Justice Harlan.

> Every communication has an individuality and "value" of its own. The suppression of a particular writing or other tangible form of expression is, therefore, an individual matter, and in the nature of things every such suppression raises an individual constitutional problem, in which a reviewing court must determine for itself whether the attacked expression is suppress[i]ble within constitutional standards. Since those standards do not readily lend themselves to generalized definitions, the constitutional problem in the last analysis becomes one of particularized judgments which appellate courts must make for themselves.
>
> **I do not think that reviewing courts can escape this responsibility** by saying that the trier of facts, be it a jury or a judge, has labeled the questioned matter as "obscene," for, if "obscenity" is to be suppressed, the question whether a particular work is of that character involves not really an issue of fact but a question of constitutional judgment of the most sensitive and delicate kind.

Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 506, n.25 (1984) quoting *Roth v. United States*, 354 U.S. 476, 497-498 (1957) (Harlan, J., concurring and dissenting) (emphasis added).

In the present case, by holding that "weak and unsatisfactory evidence" of lascivious intent can make pornography of an otherwise innocuous photograph, the Georgia Court of Appeals sought to "escape this responsibility." As detailed in the previous section, the Georgia courts are not alone in seeking to escape that responsibility.

In order to assure that courts discharge their responsibility to perform that independent examination, this Court should revisit the language in footnote 28 of *Ferber*. It is not clear from the language of the footnote whether this Court's reason for not performing an independent examination was that the issue had been waived or that on the facts of *Ferber* an as-applied First Amendment defense was utterly untenable. If the latter, an independent examination – if a very brief one – still ought to have been performed. This Court should make clear that, absent a waiver, an independent examination is always mandatory in these cases.

III. The Writ Should be Granted in order to hold that the independent examination requirement for child pornography prosecutions entails an objective standard: that to be unprotected speech, pictures of children must either be pornographic in themselves or be the product of child abuse.

In order to perform an independent examination, it is necessary to determine if that examination will be objective or subjective. Some courts have adopted an objective standard. *United States v. Amirault*, 173 F.3d 28, 33 (1st Cir. 1999); *People v. Lamborn*, 185 Ill.2d 585, 590, 708 N.E.2d 350, 354 (1999); *State v. Gates*, 182 Ariz. 459, 463, 897 P.2d 1345, 1349 (1994) ("The defendant is the one who sets up the exhibition, and the lewdness of that exhibition is measured, in part, by the defendant's intent. But defendant's intent cannot create a 'lewd exhibition' out of otherwise innocent activity by children."); *United States v. Villard*, 700 F. Supp. 808 (D.N.J. 1988).

Georgia has placed itself at the forefront of those that embrace a subjective standard. *United States v. Moore*, 215

F.3d 681, 687 (7th Cir. 2000); *United States v. Knox*, 32 F.3d 733, 738 (3d Cir. 1994). Because *Knox* and *Moore* involved material marketed to pedophiles, those cases do not go as far as Georgia has gone in the present case.

The better rule is an objective a standard, limiting the analysis to the four corners of the images at issue or to evidence that children were abused in the creation of the images. An objective approach is consistent with the rational for exiling child pornography from the protection of the First Amendment: protecting children from abuse in creation of the material and them from the consequences of having that material circulate.

A subjective approach allows dangerous and unchecked expansion of child pornography law. A subjective approach calls upon courts to see the world from a pedophile's perspective. Unfortunately, pedophiles can find any picture of children erotic. See Adler, *Inverting the First Amendment*, 149 U.Pa.L.Rev. 921, 945, n.108 (2001).

The subjective approach has led to the ill-advised expansion of the concept of child pornography described above, which has come to represent a real threat to law abiding parents. Adler, *supra*, at 964-965, notes 191-196; Marion Rubin, Naked Truths 53-59 (2002) (describing convictions and plea bargains as well as the drastic consequences even of acquitals in these cases.)

Moreover, a subjective standard is circular. A pedophile is someone who enjoys child pornography; child pornography is material enjoyed by pedophiles.

The present case illustrates how far from its central rational a subjective approach can take child pornography law. *Ferber* involved "films devoted almost exclusively to

depicting young boys masturbating." 458 U.S. at 752. The pictures at issue in *Osborn* were worse. 495 U.S. at 107, note 1. The harm children suffered in the creation of those images and from their continued circulation is self-evident and serious. Those harms are the reason *Ferber* withdrew first-amendment protection from child pornography. 458 U.S. at 756-763. The further the law strays from those indisputable harms, the closer it comes to policing "a person's private thoughts," which it may not do. *Stanley v. Georgia*, 394 U.S. 557, 566 (1969); *Osborne v. Ohio*, 495 U.S. 103, 109 (1990); *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 253 (2002).

IV. The Writ Should Be Granted Because The Decision Below Undertakes To Punish A Person For His Private Thoughts.

This Court has repeatedly held, beginning with a reversal of the Georgia Supreme Court, that Congress and the states, "cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts." *Stanley v. Georgia*, 394 U.S. 557, 566 (1969); *Osborne v. Ohio*, 495 U.S. 103, 109 (1990); *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002).

In *Ashcroft*, this Court recently reaffirmed that,

> First Amendment freedoms are most in danger when the government seeks to control thought or to justify its laws for that impermissible end. The right to think is the beginning of freedom, and speech must be protected from the government because speech is the beginning of thought.
>
> To preserve these freedoms, and to protect speech for its own sake, the Court's First

> Amendment cases draw vital distinctions between words and deeds, between ideas and conduct.

Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002).

Here, the Court of Appeals has held that a defendant's "lustful disposition" can transform an innocuous photograph into child pornography. (App. B at 27a-28a). That holding is consistent with other holdings that embraces a subjective analysis of child pornography. E.g. *United States v. Moore*, 215 F.3d 681, 687 (7th Cir. 2000); *United States v. Knox*, 32 F.3d 733, 738 (3d Cir. 1994). Such holdings become bound up in projections about whether these pictures will permit pedophiles to fantasize about them. Such holdings and such projections are particularly inappropriate where, as here, the state has selected a proportionately small set of pictures in isolation from the rest of a photographer's work and relied heavily upon their cumulative impact. More fundamentally, such holdings "seek to control thought."

V. The writ should be granted because conviction on the basis of "weak and unsatisfactory" evidence of a lustful disposition is inconsistent with Due Process.

Even if the First Amendment were not implicated, sustaining convictions on the basis of "weak and unsatisfactory" evidence of a defendant's lustful thoughts would be inconsistent with due process. In *Jackson v. Virginia*, 443 U.S. 307, 313 (1979), this Court held — as a "readily apparent" proposition — that Louisiana's "no evidence" standard, which is comparable to Georgia's any-evidence rule, "is simply inadequate to protect against misapplications of the constitutional [Due Process] standard of reasonable doubt." This Court went on to note that "a mere modicum" of evidence might be sufficient under such a standard. "But it could not seriously be argued that such a

'modicum' of evidence could by itself rationally support a conviction beyond a reasonable doubt." *Jackson*, 443 U.S. at 313.

VI. The writ should be granted, pursuant to this Court's supervisory authority, to reverse the federal courts' denial of a certificate of appealability.

A certificate of appealability (COA) is due to be granted whenever "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further.'" *Miller-El v. Cockrell*, 537 U.S. 322, 336, 123 S.Ct. 1029, 1039 (2003). The reasonably-debatable standard obtains as to both substantive and procedural rulings. *Slack v. Daniel*, 529 U.S. 473, 484, 120 S.Ct. 1595, 1604 (2000). That Craft satisfied the reasonably-debatable standard is established, at lease prima facia, by the length of the magistrate's report and recommendation (App. E at 15a-51a), to which the District Court cited without elaboration when he denied Craft's request for a COA. (App. B at 2a-3a).

More specifically, as to substantive rulings, the reasonably-debatable standard is met for the reasons set out in the preceding sections of this petition. As to procedural rulings, the Georgia Court of Appeals addressed the merits of the claims raised in Craft's habeas petition; and the Supreme Court allowed that decision to stand in an unexplained order. Those actions, this Court has plainly held, "remove[d] any bar to federal-court review that might otherwise have been available." *Ylst v. Nunnemaker*, 501 U.S. 797, 801 (1991). The federal courts' insistence on inventing procedural barriers is in direct contravention of *Ylst* and calls for an exercise of this Court's supervisory authority.

Moreover, as detailed below, Craft's treatment in the state courts has been marred by a charged atmosphere. It is particularly important in such an environment that a defendant not be deprived of federal remedies to which he is legally entitled.

CONCLUSION

The present case has aroused considerable passion. When a county magistrate allowed Craft to make bond, the local newspaper published an editorial condemning that decision and attacking the magistrate. Editorial, *Allen's Turnaround*, Augusta Chron. April 21, 1998 *available at* < http://web.archive.org/web/20041112170014/http://augustachronicle.com/stories/042198/opi_046-7932.shtml >. Craft was soon back in jail. In his opening statement, the District Attorney called Craft, "one of the most dangerous child molesters . . . ever seen in the courts of this state of Georgia or in this nation." In its brief to the Court of Appeals, the state was moved to write about "its feelings." Even as it reversed most of Craft's convictions, the Court of Appeals was moved to declare Craft's conduct "despicable and perverted." (App. A at 12a).

The righteous passion of those guardians of the public good was not shared by the individuals who are the supposed victims. At sentencing parents of children Dr. Craft has been convicted of molesting and exploiting — speaking for themselves and for the children, whose live testimony the trial court discouraged — asked that Dr. Craft be released immediately.

Such passion is often aroused by child-pornography cases. See Adler, *The Perverse Law of Child Pornography*, 101 Colum. L.Rev. 209, 240, n.175 (2001) (describing the "political firestorm" prompted by *United States v Knox*, 32 F.3d 733 (3d Cir. 1994)).

Such passion creates pressure and temptation to disregard the Constitution of the United States and the decisions of this Court. Such passion has led to dangerous expansion of child pornography law and made it a thought crime.

Accordingly, Dr. Robert Bruce Cratt respectfully requests that his petition for the writ of certiorari be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT FILED AUGUST 24, 2005

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 05-12881-I

ROBERT BRUCE CRAFT,

Petitioner-Appellant,

versus

CALVIN D. MORTON, Warden,
COMMISSIONER OF THE GEORGIA DEPARTMENT OF CORRECTIONS, James Donald,

Respondents-Appellees.

Appeal from the United States District Court for the Southern District of Georgia

ORDER:

To merit a certificate of appealability, appellant must show that reasonable jurists would find debatable both (1) the merits of an underlying claim and (2) the procedural issues he seeks to raise. *See* 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 478, 120 S.Ct. 1595, 1600-01, 146 L.Ed.2d 542 (2000). Because appellant has failed to make the requisite showing, the motion for a certificate of appealability is DENIED.

/s/ Rosemary Barkett
UNITED STATES CIRCUIT JUDGE

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA, AUGUSTA DIVISION FILED JUNE 28, 2005

IN THE UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF GEORGIA
AUGUSTA DIVISION

CV 103-144

ROBERT BRUCE CRAFT,

Petitioner,

v.

CALVIN D. MORTON, Warden, and JAMES DONALD, Commissioner of the Georgia Department of Correction,

Respondent.

ORDER

In the captioned case, Petitioner seeks to appeal the denial of his habeas corpus petition under 28 U.S.C. § 2254. Petitioner is represented by counsel and has paid the filing fee for his appeal. Pursuant to 28 U.S.C. § 2253(c), however, an appeal may not be taken in this matter unless the Court issues a Certificate of Appealability. This certificate may issue only if Petitioner makes "a substantial showing of the denial of a constitutional right." *Id.* As demonstrated by the Magistrate Judge's Report and Recommendation, which was

adopted as the opinion of this Court, Petitioner has not made the requisite showing. Accordingly, a Certificate of Appealability is hereby **DENIED**.

ORDER ENTERED at Augusta, Georgia, this 28th day of June 2005.

s/ [illegible]
UNITED STATES DISTRICT JUDGE

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA, AUGUSTA DIVISION FILED MARCH 15, 2005

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
AUGUSTA DIVISION

CV 103-144

ROBERT BRUCE CRAFT,

Petitioner,

v.

CALVIN D. MORTON, Warden, and JAMES DONALD, Commissioner of the Georgia Department of Corrections,

Respondents.

ORDER

After a careful, *de novo* review of the file, the Court concurs with the Magistrate Judge's Report and Recommendation to which objections have been filed.[1]

1. Petitioner requested and received an extension of time to file his objections. (*See* doc. nos. 31 & 32). Despite receiving an extension of time of over one month to object, Petitioner failed, as required by Loc. R. 7.1(a), to seek permission to file a brief in excess of twenty-five (25) pages *prior to* submission of his brief in support of his objections. Nevertheless, the Clerk of Court filed Petitioner's (Cont'd)

(Doc. no. 33). Petitioner rests his claims for federal habeas corpus relief on three grounds: (1) his First Amendment rights were violated by the state courts' decision to criminalize protected speech; (2) his Due Process rights were violated when the state courts ruled that an essential element of his convictions for sexual exploitation of a minor and for child molestation – lascivious – intent can be inferred from "evidence which is exceedingly weak and unsatisfactory";[2] and (3) his Due Process rights were violated because three of his convictions were based solely on the testimony of one child, and that testimony was not sufficient to support the convictions. (Doc. no. 34, p. 3). Petitioner offers nothing new in his objections concerning his second and third stated grounds for relief, and therefore, his objections to the Magistrate Judge's conclusion that he is not entitled to relief on that ground are overruled without further comment.

As to ground one, Petitioner contends that the Magistrate Judge has been overly strict in interpreting the exhaustion requirement. Although Petitioner concedes that he "seriously

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(Cont'd)

fifty-one (51) page brief (doc. no. 34), and therefore, his belated motion seeking permission to file a brief exceeding the page limit provided for in the Local Rules is **MOOT.** (Doc. no. 35). Notably, however, it is doubtful that fifty-one pages were needed for objections, as a significant portion of Petitioner's objections are simply a verbatim restatement of his prior briefing. (cf. doc. no. 2, pp. 25-27 *with* doc. no. 34, pp. 41-43).

2. Petitioner alternately refers to this element of intent as "lascivious intent" and "lustful disposition." (*Cf.* doc. no. 2, pp. 2, 27 *with* doc. no. 34, pp. 3, 45).

raised his First amendment argument for the first time late in the appeal process," (doc. no. 22, p. 4), he strenuously argues that under *Ylst v. Nunnemaker*, 501 U.S. 797, 801 (1991), "any bar" to federal review of his First Amendment arguments should be lifted. (Doc. no.34, p. 9). Contrary to Petitioner's argument that the Magistrate Judge disregarded *Ylst* out of hand simply because it was decided prior to the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), a careful examination of the Report and Recommendation shows that the Magistrate Judge noted that *Ylst* had been decided prior to AEDPA and then went on to explain why in the post-AEDPA era, the generalization that "any bar" to federal review had been removed was too broad, given the requirement that a petitioner must specifically identify in the state courts the constitutional theory underlying his claims for habeas corpus relief. (Doc. no. 28, pp. 13-14 (citing *Zeigler v. Crosby*, 345 F.3d 1300, 1307 (11th Cir. 2003) and *Henry v. Dep't of Corrs.*, 197 F.3d 1361, 1366-67 (11th Cir. 1999)). Thus, *Ylst* was not discounted simply because it pre-dated the AEDPA, but rather because the presumption stated therein – "[w]here there has been one reasoned state judgment rejecting a federal claim, later unexplained orders upholding that judgment or rejecting the same claim rest upon the same ground," *Ylst*, 501 U.S. at 803 – is of no help to Petitioner in overcoming the procedural bar raised by the exhaustion requirement if he failed to sufficiently identify the nature of his federal constitutional theory of relief.

Accordingly, Petitioner also takes issue with the conclusion that he did not sufficiently identify the nature or full extent of his First Amendment argument in the state

courts. Petitioner argues that raising a federal issue is "easily" done by indicating the federal law basis for his claim in state court briefing and citing supporting federal law. *Howell v. Mississippi*, 125 S.Ct. 856, 859 (U.S. Jan. 24, 2005) (*per curiam*) (citing *Baldwin v. Reese*, 541 U.S. 27, 32 (2004)). Thus, goes the argument, because Petitioner mentioned the First Amendment in his Supplemental Brief to the Georgia Court of Appeals, the state courts had an opportunity to address his First Amendment claims such that they should not now be barred from federal review.[3] However, unlike the instant case where there is a dispute concerning ground one of the petition about whether Plaintiff made the state court aware that he had two distinct federal claims (Due Process and First Amendment), the issue in *Howell* was

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3. In his original appellate brief, Petitioner's first enumerated error stated:

> 1. The verdict is contrary to the evidence because the State failed to prove beyond a reasonable doubt that any of the photographs admitted into evidence and attached as exhibits to Counts 1-70 of the Columbia County Indictment and as exhibits to Counts 1-45 of the Richmond County Indictment violated **O.C.G.A. § 16-12-100 or O.C.G.A. § 16-6-4. (T-569-570).**

(Resp't Ex. 6A, p. 14). The Standard of Review for this first enumeration of error concerning the sufficiency of the evidence was listed as *Jackson v. Virginia*, 443 U.S. 307, 99 S. Ct. 2781, 61 L.Ed. 560 (1979). (*Id.* at 35).

The heading for the first enumerated error in the supplemental brief read: "**Enumeration One: Sufficiency of Evidence As To The Images.**" (Resp't Ex. 6H, p. 3).

whether the petitioner made it clear that he had a federal claim lurking in his briefing that utilized state law as a basis for his claimed error about jury instructions. *Howell*, 125 S. Ct. at 858-59.

The Court finds the instant case to be more analogous to a recent case out of the Ninth Circuit in which a petitioner was attempting to raise two related, but distinct, federal claims. *Rose v. Palmateer*, 395 F.3d 1108, 1112 (9th Cir. 2005). In *Rose*, the court reasoned:

> Here, although Rose's Fifth Amendment claim is related to his claim of ineffective assistance, he did not fairly present the Fifth Amendment claim to the state courts when he merely discussed it as one of several issues which were handled ineffectively by his trial and appellate counsel. While admittedly related, they are distinct claims with separate elements of proof, and each claim should have been separately and specifically presented to the state courts. *Cf. Kimmelman v. Morrison*, 477 U.S. 365, 374 & n.1, 106 S. Ct. 2574, 91 L.Ed.2d 305 (1986) (distinguishing between a Fourth Amendment suppression claim and a Sixth Amendment ineffective assistance claim based on failure to litigate competently the Fourth Amendment issue, and stating that "[w]hile defense counsel's failure to make a timely suppression motion is the primary manifestation of incompetence and source of prejudice advanced by respondent, the two claims are nonetheless distinct, both in nature and in the requisite elements of proof").

Id. Thus, simply mentioning one federal issue within the context of another – for example, the First Amendment within a Due Process Sufficiency of the Evidence claim, does not automatically satisfy the exhaustion requirement.

In any event, the Magistrate Judge went on to determine that even if it were assumed that Petitioner had exhausted all of his specific First Amendment claims now raised, he still was not entitled to federal habeas corpus relief. (*Id.* at 17-23). Petitioner raises nothing new in his objections to change that conclusion.

Petitioner also takes issue with the Magistrate Judge repeatedly pointing out that his arguments fail to make the distinction between the convictions for sexual exploitation of a minor (O.C.G.A. § 16-12-100) and for child molestation (O.C.G.A. § 16-6-4). (Doc. no. 34, p. 33). However, as the Magistrate Judge pointed out, not only do these two separate statutes require different elements of proof to obtain a conviction, but throughout the Report and Recommendation, the issues concerning exactly which claims were raised before the state courts and exactly which convictions were challenged are of prime importance to determining whether Petitioner has satisfied that exhaustion requirement for seeking federal habeas corpus relief.[4] Thus, there is no error

4. For example, on its face, Petitioner's motion for reconsideration before the Georgia Court of Appeals challenged only five Columbia County child molestation convictions obtained pursuant to O.C.G.A. § 16-6-4. (Resp't Ex. 6K, p. 1). Petitioner argued, but the Magistrate Judge rejected, the proposition that use of the signal "E.g." and the inclusion of the word "exploitation" (Cont'd)

with the Magistrate Judge pointing out that the petition often grouped together all convictions under the heading of "child pornography" without paying adequate attention to the distinctions between sexual exploitation and child molestation.[5]

All remaining objections are overruled.[6] Accordingly, the

(Cont'd)
without statutory reference (e.g., citation to the applicable statute) or reference to a specific indictment count was sufficient to put the Court of Appeals on notice that Petitioner was attempting to challenge all of his convictions that had been affirmed on appeal. (Doc. no. 28, p. 15). As the face of the motion for reconsideration only specifically listed five convictions, it does not appear, as alleged by Petitioner, that the Magistrate Judge performed "a hostile misreading" of the motion. (Doc: no. 34, p. 29).

5. The Court notes that Petitioner's tendency to avoid distinctions often makes it difficult to follow his arguments. For example, under the heading of alleged error by the Magistrate Judge in deciding the *merits* of ground *one* of the petition – the ground raising First Amendment claims concerning stretching the boundaries of child pornography and criminalizing protected speech – Petitioner proceeds to discuss the *exhaustion* issues originally discussed under ground *two* of his federal petition. (*Cf.* doc. no. 2, pp. 27-29 *with* doc. no. 34, p. 44). Ground two of the federal petition involves Due Process issues related to reviewing the sufficiency of the evidence of criminal intent used to support Petitioner's convictions. (Doc. no. 28, pp. 23-26).

6. Notably, Petitioner attempts to object to the Magistrate Judge recommending that Petitioner's request for a hearing and a prehearing conference be held. (Doc. no. 33, p. 3, Objections # 6 & 7). However,
(Cont'd)

Appendix C

Report and Recommendation of the Magistrate Judge is **ADOPTED** as the opinion of this Court. Thus, Petitioner's § 2254 petition is **DENIED**, this civil action is **CLOSED**, and the Clerk is **DIRECTED** to enter a final judgment in favor of Respondent.

SO ORDERED this 15th day of March, 2005, at Augusta, Georgia.

s/ Dudley H. Bowen, Jr.
UNITED STATES DISTRICT JUDGE

(Cont'd)
the Report and Recommendation now under consideration did not make any recommendation on these two issues. The docket reflects that Petitioner's request for a hearing and a prehearing conference were denied by an Order of the Magistrate Judge over one year ago. (Doc. no. 10, p. 3). Under Fed. R. Civ. P. 72(a), "Within 10 days after being served with a copy of the magistrate judge's order, a party may serve and file objections to the order; a party may not thereafter assign as error a defect in the magistrate judge's order to which objection was not timely made." *See also Farrow v. West*, 320 F.3d 1235, 1248-49 (11th Cir. 2003) ("[W]hen . . . a litigant could have tested a magistrate's ruling by bringing it before the district judge, but failed to do so within the allotted ten-day period, he cannot later leapfrog the trial court and appeal the ruling directly to the court of appeals." (quoting *Pagano v. Frank*, 983 F.2d 343, 346 (1st Cir.1993)). Thus, Petitioner's attempt to bring untimely objections on the ruling on his request for a hearing and a prehearing conference is a nullity.

APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA, AUGUSTA DIVISION FILED DECEMBER 8, 2004

THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT
OF GEORGIA, AUGUSTA DIVISION

CV 104-144

ROBERT BRUCE CRAFT,

Plaintiff,

v.

CALVIN D. MORTON, Warden, and JAMES DONALD, Commissioner of the Georgia Department of Corrections,

Defendants.

ORDER

Let a copy of this Report and Recommendation be served upon counsel for the parties. Any party who objects to this Report and Recommendation or anything in it must file, not later than December 22, 2004, specific objections with the Clerk of this Court. The Clerk will submit this Report and Recommendation together with any objections to the Honorable Dudley H. Bowen, Jr., United States District Judge, on December 23, 2004. Failure to file specific objections will bar any later challenge or review of the factual findings of the Magistrate Judge. *See* 28 U.S.C.

§ 636(b)(1)(C); *Thomas v. Arn*, 474 U.S. 140, 106 S. Ct. 466, 88 L.Ed.2d 435 (1985); *Nettles v. Wainwright*, 677 F.2d 404 (5th Cir. 1982) (*en banc*). In order to challenge the findings and recommendations of the Magistrate Judge, a party must, by December 22, 2004, file with the Clerk of the Court written objections which shall specifically identify the portions of the proposed findings and recommendation to which objection is made and the specific basis for objection. A copy of the objections must be served upon all other parties to the action.

Requests for extension of time to file objections to this Report and Recommendation shall be directed to the Honorable Dudley H. Bowen, Jr.

Upon receipt of objections meeting the specificity requirement set out above, a United States District Judge shall make a *de novo* determination of those portions of the report, proposed findings, or recommendation to which objection is made and may accept, reject, or modify in whole or in part, the findings or recommendations made by the Magistrate Judge. The Judge, however, need conduct a hearing only in his discretion or if required by law, and may consider the record developed before the Magistrate Judge, making his own determination on the basis of that record. The Judge may also receive further evidence, recall witnesses or recommit the matter to the Magistrate Judge with instructions.

Objections not meeting the specificity requirement set out above will not be considered by a United States District Judge.

Appendix D

A party may not appeal a Magistrate Judge's recommendation directly to the United States Court of Appeals for the Eleventh Circuit. Appeals may be made only from a final judgment entered by or at the discretion of a District Judge.

The Clerk is **DIRECTED** to serve a copy of this Report and Recommendation on counsel for all parties.

SO ORDERED this 8th of December, 2004, at Augusta, Georgia.

s/ W. Leon Barfield
W. LEON BARFIELD
UNITED STATES MAGISTRATE JUDGE

APPENDIX E — MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION, UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA, AUGUSTA DIVISION FILED DECEMBER 8, 2004

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA AUGUSTA DIVISION

CV 103-144

ROBERT BRUCE CRAFT,

Petitioner,

v.

CALVIN D. MORTON, Warden, and JAMES DONALD, Commissioner of the Georgia Department of Corrections,

Respondents.

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

Petitioner Robert Bruce Craft, an inmate at D. Ray James State Correctional Institution in Folkston, Georgia, brings the above-captioned petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. For the reasons stated more fully below, the Court **REPORTS** and **RECOMMENDS** that the petition be **DENIED,** that this civil action be CLOSED, and that a final judgment be **ENTERED** in favor of Respondents.

Appendix E

I. BACKGROUND

Following a bench trial in the Superior Court of Richmond County on March 20-23, 2000, Petitioner was convicted of 102 counts of sexual exploitation of a minor and fifteen (15) counts of child molestation. *Craft v. State*, 252 Ga. App. 834, 834, 558 S.E.2d 18, 21 (2001). Petitioner had been indicted in Richmond County under O.C.G.A. § 16-12-100(b)(5) on forty-five counts of sexual exploitation of a minor and under O.C.G.A. § 16-6-4 on one count of child molestation[1]; he had also been indicted in Columbia County under O.C.G.A. § 16-12-100(b)(5) on thirty-one counts of sexual exploitation of a minor, under O.C.G.A. § 16-12-100(b)(7) on twenty-four counts of sexual exploitation of a minor, under O.C.G.A. § 16-12-100(b)(8) on three counts of sexual exploitation of a minor, and under O.C.G.A. § 16-6-4 on fifteen counts of child molestation.[2]

---

1. The State eventually withdrew the molestation charge. *Craft*, 558 S.E.2d at 24.

2. In pertinent part, Georgia's child molestation statute provides: "A person commits the offense of child molestation when he or she does any immoral or indecent act to or in the presence of or with any child under the age of 16 years with the intent to arouse or satisfy the sexual desires of either the child or the person." O.C.G.A. § 16-6-4(a).

> The applicable portions of Georgia's sexual exploitation statute provide:
>
> (5) It is unlawful for any person knowingly to create, reproduce, publish, promote, sell, distribute, give,
>
> (Cont'd)

Id. at 24. Petitioner waived the issue of venue on his Columbia County charges, and both cases were tried in Richmond County. *Id.* Petitioner was convicted of all charges, save one exploitation charge under O.C.G.A. § 16-12-100(b)(5) and the one Richmond County charge for child molestation that the State withdrew. *Id.* Petitioner was sentenced to concurrent twenty-year terms of imprisonment for each exploitation conviction and concurrent twenty-year terms on probation for each molestation conviction. (Doc. no. 2, p. 6).

(Cont'd)

> exhibit, or possess with intent to sell or distribute any visual medium which depicts a minor or a portion of a minor's body engaged in any sexually explicit conduct.
>
> . . . .
>
> (7) It is unlawful for any person knowingly to bring or cause to be brought into this state any material which depicts a minor or a portion of a minor's body engaged in any sexually explicit conduct.
>
> (8) It is unlawful for any person knowingly to possess or control any material which depicts a minor or a portion of a minor's body engaged in any sexually explicit conduct.

O.C.G.A. § 16-12-100(b)(5),(7), (8). Relevant to this case, the statute defines" sexually explicit conduct" as actual or simulated "(C) Masturbation; (D) Lewd exhibition of the genitals or pubic area of any person; . . . [or] (H) defecation or urination for the purpose of sexual stimulation of the viewer." *Id.* § 16-12-100(a)(4).

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On direct appeal, the Georgia Court of Appeals affirmed Petitioner's convictions for Counts 1 through 22, 30 through 35, 40, and 41 of the Richmond County indictment, but it reversed the convictions on Counts 23 through 29, 36 through 39, and 42 through 45. *Craft,* 558 S.E.2d at 25. As to the Columbia County convictions, the Court of Appeals affirmed Petitioner's convictions for Counts 33, 44 through 46, 53, 68, 14 through 18, 34, 35, 37 through 40, and 42, but it reversed the convictions on Counts 1 through 13, 19 through 32, 41, and 67; 43, 47 through 52, 54 through 63, 69, and 70; and 64 through 66. *Id.* at 25-26. Petitioner filed a motion for reconsideration, but the Court of Appeals denied that motion. (Resp't Exs. 6K, 6L). Both Petitioner and the State filed petitions for certiorari with the Georgia Supreme Court, but the cross requests were denied without a substantive explanation. (Resp't Ex. 6N). Likewise, Petitioner's request for certiorari filed with the United States Supreme Court was denied. (Resp't Ex. 14). No state habeas petition was filed, and this federal petition for a writ of habeas corpus followed.

Petitioner raises three overarching grounds for relief in these federal proceedings: (1) his First Amendment' rights have been violated because the state courts have stretched the definition of child pornography beyond its constitutional bounds and criminalized protected speech; (2) his Due Process rights have been violated because the state courts have held that his convictions can be sustained on the basis of "weak and unsatisfactory" evidence of a lustful disposition; and (3) his Due Process rights were further violated by his convictions on counts 71, 72, and 73 of the Columbia County indictment because the evidence as to those counts was insufficient. (Doc. no. 1, pp. 6-7). Respondent

maintains that Petitioner's grounds for relief are either not properly before this Court or do not have substantive merit. (Doc. no. 15, pp. 2-3).

II. STANDARD OF REVIEW

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), which became law on April 24, 1996, includes amendments to Chapter 153 of Title 28, codified at 28 U.S.C. §§ 2244 & 2253-2255, and amendments to Chapter 154 of Title 28, codified at 28 U.S.C. §§ 2261-2266 that are applicable to Petitioner's application for federal habeas relief. According to 28 U.S.C. § 2254(d):

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

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The United States Supreme Court interpreted § 2254(d) in *Williams v. Taylor,* 529 U.S. 362, 404 (2000). The Supreme Court explained:

> Section 2254(d)(1) defines two categories of cases in which a state prisoner may obtain federal habeas relief with respect to a claim adjudicated on the merits in state court. Under the statute, a federal court may grant a writ of habeas corpus if the relevant state-court decision was either (1) "*contrary to* . . . clearly established Federal law, as determined by the Supreme Court of the United States," or (2) "*involved an unreasonable application of* . . . clearly established Federal law, as determined by the Supreme Court of the United States."

Id. at 404-05.

The Eleventh Circuit has explained the difference between the "contrary to" and "unreasonable application" clauses in § 2254(d)(1) as follows:

> A state court decision is "contrary to" clearly established federal law if either (1) the state court applied a rule that contradicts the governing law set forth by Supreme Court case law, or (2) when faced with materially indistinguishable facts, the state court arrived at a result different from that reached in a Supreme Court case.

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> A state court conducts an "unreasonable application" of clearly established federal law if it identifies the correct legal rule from Supreme Court case law but unreasonably applies that rule to the facts of the petitioner's case. An unreasonable application may also occur if a state court unreasonably extends, or unreasonably declines to extend, a legal principle from Supreme Court case law to a new context. Notably, an "unreasonable application" is an "objectively unreasonable" application.

Putman v. Head, 268 F.3d 1223, 1241 (11th Cir. 2001) (internal citations omitted).[3] In sum, the writ of habeas corpus may be granted if "the state court's decision was contrary to, or involved an objectively unreasonable application of, the

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3. As to the analysis of the "unreasonable application" standard, the Supreme Court has explained:

> Stated simply, a federal habeas court making the "unreasonable application" inquiry should ask whether the state court's application of clearly established federal law was objectively unreasonable. The federal habeas court should not transform the inquiry into a subjective one by resting its determination instead on the simple fact that at least one of the Nation's jurists has applied the relevant federal law in the same manner the state court did in the habeas petitioner's case.

Williams, 529 U.S. at 409-10; *see also Lockyer v. Andrade*, 538 U.S. 63, 76 (2003) (finding application of Supreme Court precedent to be unreasonable requires more than an incorrect or erroneous state court decision; it must be "objectively unreasonable").

governing Federal law set forth by Supreme Court cases." *McIntyre v. Williams*, 216 F.3d 1254, 1257 (11th Cir. 2000).

Moreover, § 2254(e)(1) sets a highly deferential standard of review for state court factual determinations. "[A] determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." *Fugate v. Head*, 261 F.3d 1206, 1215 (11th Cir. 2001) (citations omitted); *see also Crawford v. Head*, 311 F.3d 1288, 1317 (11th Cir. 2002) (affirming state court factual determination "because there is support for it in the record and [the petitioner] has not rebutted the finding by clear and convincing evidence"). Moreover, "some evidence suggesting the possibility" that a petitioner's version of the pertinent facts is correct is not sufficient to carry the burden of showing that a state court made an unreasonable determination of fact as contemplated by § 2254(d)(2). *Bottoson v. Moore*, 234 F.3d 526, 540 (11th Cir. 2000).

With these basic principles in mind, the Court now turns its attention to the instant petition.

III. DISCUSSION

A. Ground I: First Amendment Challenge

Petitioner's First Amendment claim that the state courts have stretched the definition of child pornography beyond its constitutional bounds and criminalized protected speech can be broken down into four components: (1) Georgia courts

have given an overly expansive construction to the proscription on "lewd exhibition of the genitals"; (2) Georgia courts failed to conduct an independent examination of whether the material upon which Petitioner was convicted is constitutionally protected speech; (3) Georgia courts have approved of premising legislation on the desirability of controlling a person's private thoughts; and (4) the decision of the Georgia courts to affirm any of Petitioner's convictions chills protected speech. (Doc. no. 2, pp. 18, 20, 24, 25).

1. Procedurally Barred or Defaulted Claims

a. The AEDPA's Exhaustion Requirement.

The AEDPA preserves the traditional exhaustion requirement, which requires a district court to dismiss habeas claims that the petitioner has a right to raise, by any available procedure, in state court. 28 U.S.C. § 2254(b)(1)(A) & (c). "An applicant shall not be deemed to have exhausted the remedies available in the courts of the State . . . if he has the right under the law of the State to raise, by *any* available procedure, the question presented." *Id.* § 2254(c) (emphasis added). In reference to this requirement, the Supreme Court has held that a state inmate is deemed to have exhausted his state judicial remedies when he has given the state courts, or they have otherwise had, a fair opportunity to address the state inmate's federal claims. *Castille v. Peoples*, 489 U.S. 346, 351 (1989). "In other words, the state prisoner must give the state courts an opportunity to act on his claims before he presents those claims to a federal court in a habeas petition." *O'Sullivan v. Boerckel*, 526 U.S. 838, 842 (1999).

Moreover, claims brought in a federal habeas petition which were not raised in the petitioner's state habeas petition or on direct appeal are procedurally barred because the exhaustion requirement has not been met as to those claims. For example, a prisoner may not defeat the exhaustion requirement, by simply "letting the time run" until state remedies are no longer available. *Edwards v. Carpenter*, 529 U.S. 446, 453 (2000) (quoting *O'Sullivan*, 526 U.S. at 848); *see also Teague v. Lane*, 489 U.S. 288, 297-98 (1989) (failing to raise claim at trial or on direct appeal, thus forfeiting review of the claim in the Illinois courts either on appeal or collateral review, bars claim from federal habeas review).

b. Federal Habeas Petitioner Required to Adhere to State Procedural Rules.

Claims may also become defaulted when a petitioner raises them in a manner inconsistent with a state procedural rule.[4] *Coleman v. Thompson*, 501 U.S. 722, 750 (1991); *Wainwright v. Sykes*, 433 U.S. 72, 87-91 (1977). First, a federal court will not review a state court decision involving a question of federal law if the state court decision is based on state law, even state procedural law, that is independent of the federal question and adequate to support the judgment. *Coleman*, 501 U.S. at 727-31; *Harris v. Reed*, 489 U.S. 255, 262 (1989). The independent and adequate state ground doctrine "applies to bar federal habeas when a state court declined to address a prisoner's federal claims because the

4. The substantive changes in 28 U.S.C. § 2254(d) made by the AEDPA do not change the procedural default rules. *See, e.g., Moleterno v. Nelson*, 114 F.3d 629, 633-34 (7th Cir. 1997).

prisoner had failed to meet a state procedural requirement." *Coleman*, 501 U.S. at 729-30. Thus, when a state habeas court correctly applies a state procedural default rule, a federal habeas court should ordinarily respect the state court ruling and refuse to address the claim. *Caniff v. Moore*, 269 F.3d 1245,1246-47 (11th Cir. 2001) (*per curiam*) (citing *Harmon v. Burton*, 894 F.2d 1268, 1270 (11th Cir. 1990)).

Simply put, a federal habeas petitioner must first comply with the applicable state procedural rules in bringing his claims before the state courts before those claims may be raised in federal court.

c. State Procedural Default Excused Only in Certain Narrow Circumstances.

To overcome the procedural bar, a petitioner must show either cause for the default and resulting actual prejudice, or that a fundamental miscarriage of justice will occur if the federal court does not address the petitioner's claims. *Coleman*, 501 U.S. at 750; *Mincey v. Head*, 206 F.3d 1106,1135-36 (11th Cir. 2000) (citing *McCoy v. Newsome*, 953 F.2d 1252, 1257 (11th Cir. 1992)). Cause entails a showing "that some objective factor external to the defense impeded" efforts to comply with the state procedural rule. *Coleman*, 501 U.S. at 753. A state petitioner may also demonstrate cause to overcome a procedural default by demonstrating that he received constitutionally ineffective assistance of counsel. *Turpin v. Todd*, 268 Ga. 820, 826, 493 S.E.2d 900, 906 (1997). The narrow fundamental miscarriage of justice exception, on the other hand, encompasses the extraordinary instance in which a constitutional violation

probably has resulted in the conviction of one actually innocent of the crime. *Murray v. Carrier*, 477 U.S. 478, 496 (1986).[5]

d. Petitioner Raises First Amendment Claims that Were Not Properly Presented in the State Courts.

At trial and the beginning of the appellate process, Petitioner was represented by William Davison, Esquire. After the expiration of the normal briefing schedule in the Court of Appeals, Petitioner filed a request for permission to file a supplemental brief. That request was granted, and in that supplemental brief, new counsel (the same counsel representing Petitioner in these federal habeas proceedings) supplemented two, of the original seven, enumerations of error filed by Mr. Davison. (Resp't Exs. 6A, 6H). The parties in these proceedings do not dispute that Mr. Davison failed to raise a First Amendment challenge in his original appellate brief, but Petitioner contends that because he did present a First Amendment argument in his supplemental brief, the First Amendment issues now raised were fairly presented to the state courts. (Doc. no. 22, pp. 4-5). Thus, Petitioner contends that this Court should consider all of his First Amendment claims to be exhausted for the purpose of hurdling the procedural bar that requires a petitioner to make a state court aware of his federal constitutional issues. (*Id.*).

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5. The Court notes that in the above-captioned case, Petitioner strenuously argues that all of his claims were properly presented in the state courts, and he does not even raise the specter of the existence of cause for excusing any procedural default that might be identified by this Court.

Appendix E

Under the heading of "Enumeration of Error One: Sufficiency of the Evidence As To The Images," the supplemental brief started out with a statutory analysis of the "lewd exhibition" language of O.C.G.A. § 16-12-100, Georgia's sexual exploitation statute. (Resp't Ex. 611, p. 3). Under this first enumeration of error, Petitioner's supplemental brief cited First Amendment cases, *New York v. Ferber,* 458 U.S. 747, 764, 773 (1982) and *Osborne v. Ohio,* 495 U.S. 103, 127 (1990), within the context of his sufficiency of the evidence argument; he contended that legislation could not constitutionally control private thoughts and that Due Process requires that criminal statutes give fair warning of what activity is prohibited. (Resp't Ex. 6H, p. 3). It also stated, "Craft does not attack the constitutionality of the exploitation and molestation statutes. *What he contends is that they have been unconstitutionally applied.*" (*Id.* at 3-4 (emphasis added)).[6]

Under Georgia law, "as applied" challenges to a statute's constitutionality "must be made at the first opportunity, and it is too late to raise such question[s] after a guilty verdict has been returned by the jury." *Kolokouris v. State,* 271 Ga. 597, 597, 523 S.E.2d 311, 313 (1999). Petitioner attempts to dismiss this requirement by contending that *Kolokouris* is not controlling because the court in that case "was giving short shrift to a nonsensical argument." (Doc. no. 22, p. 12). However, the Georgia courts have repeatedly applied the rule from *Kolokouris* that challenges to the constitutionality of a statute under which a defendant is convicted must be raised

6. Petitioner re-iterates in these proceedings that he is not arguing that the statutes under which he was convicted are unconstitutional. (Doc. no. 22, p. 13).

at the first opportunity, and in any event, before a verdict is returned. *Robles v. State*, 277 Ga. 415, 421, 589 S.E.2d 566, 572 (2003) (failing to raise facial and "as applied" challenge to constitutionality of felony murder and cruelty to children statutes prior to conviction results in waiver of issue on appeal); *Hughes v. State*, 266 Ga. App. 652, 654, 598 S.E.2d 43, 46 (2004) (rejecting attempt to avoid waiver of issue of constitutionality of statute that was not raised prior to conviction because defendant thought statute had to be reviewed in light of trial testimony). Here, Petitioner did not raise at trial a First Amendment challenge the constitutionality of the application of the molestation or exploitation statutes to his charges. To the contrary, counsel specifically stated to the trial court that he was not raising a First Amendment challenge.[7] (Trial Tr., p. 568).

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7. During his argument for a directed verdict, Petitioner's counsel made the following argument to the trial court:

> Again, *we're not challenging this on First Amendment grounds*. We're not making any sort of constitutional arguments, at least in the way – in regard to the specific question about whether these photographs are lewd. Now, we think it has been some, you know unconstitutionally applied. We made some of those arguments with the equal protection and due process. But we're not saying that, you know, this is – our client had the right to go out and sexually molest children and take photographs of this nature and get himself physically involved with these children. We're not saying that ought to be the law in this country at all. *And we're not challenging this situation on those grounds, on those First Amendment grounds*. I think that's a mistake he's

(Cont'd)

Consistent with this position taken at trial, there was no mention of a First Amendment argument made in the original appellate brief.[8] However, as discussed above, the supplemental brief raised some First Amendment issues under the rubric of an enumeration of error dealing with a Due Process/sufficiency of the evidence claim. There was no mention of the First Amendment in the Court of Appeals' first decision, and the ruling on reconsideration simply recited Petitioner's First Amendment contention from his motion; notably, consistent with the timeliness rule in *Kolokouris*, there was no First Amendment "as applied" ruling from the Court of Appeals.

(Cont'd)

> driving at. *That's not our argument at all.* We're just saying under what has been defined in the courts as what is "lewd," that these photographs under these cases are not lewd and do not meet the standard.

(Trial Tr., p. 568 (emphasis added)).

8. Admittedly, the original appellate brief cited a six-part test for determining whether a visual depiction of a minor constitutes a "lascivious exhibition of the genitals or pubic area" from *United States v. Dost*, 636 F. Supp. 828, 832 (S.D. Cal. 1986), a case that referenced the First Amendment analysis of child pornography from *Ferber, supra*, as the standard against which the Court of Appeals should test the sufficiency of the evidence under *Jackson v. Virginia*, 443 U.S. 307 (1979). (Resp't Ex. 6A, pp. 17, 34-35). However, Petitioner's original brief did not argue that his First Amendment rights were violated; it instead argued that the *Dost* factors should be used to flesh out the statutory meaning "lewd exhibition of genitals" in O.C.G.A. § 16-12-100 in order to determine whether a due process violation occurred under *Jackson*. (*Id.* at 17).

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Now, in his first stated ground for relief in his federal petition, Petitioner makes a stand-alone argument, not under the rubric of a Due Process/sufficiency of the evidence claim as was done in the state courts, that his First Amendment rights have been violated by the state courts refusing to recognize that the First Amendment protects the materials upon which *his* molestation and exploitation convictions are based. This is an "as applied" challenge. He discounts the assertion of Commissioner Donald that all of his First Amendment issues were not properly presented in the state courts by arguing, "Because the Court of Appeals addressed Craft's constitutional arguments on the merits and the Supreme Court denied certiorari in an unexplained order, 'any bar to federal court review that might other wise have been available' has been removed." (Doc. no. 22, p. 4 (citing *Ylst v. Nunnemaker,* 501 U.S. 797, 801 (1991) and *Coleman v. Thompson,* 501 U.S. 722 (1991)). Petitioner concedes that he "seriously raised his First amendment argument for the first time late in the appeal process." (Doc. no. 22, p. 4). However, Petitioner contends that because the Georgia Court of Appeals had time to consider the First Amendment arguments raised in his Due Process/sufficiency of the evidence claim, and did, after ignoring it in their first opinion, address the First Amendment in its Order denying Petitioner's motion for reconsideration, all of the First Amendment issues now raised as a stand alone argument in ground one of the federal petition as to all of Petitioner's convictions should be deemed has been exhausted.

First, Petitioner's reliance on *Ylst,* a case decided before the enactment of the AEDPA, for the proposition that "any bar" to federal court review has been removed because he

mentioned the First Amendment late in the appellate process is misplaced. As the Eleventh Circuit has explained, "[T]o exhaust state remedies, petitioners must do more than present 'the state courts only with the facts necessary to state a claim for relief' and must additionally articulate the constitutional theory serving as the basis for relief." *Zeigler v. Crosby*, 345 F.3d 1300, 1307 (11th Cir. 2003) (citing *Henry v. Dep't of Corrs.*, 197 F.3d 1361, 1366 (11th Cir. 1999)). Although the exact presentation of claims may vary some between state and federal forums, "[t]he difference between the two presentations may, however, become significant where legal theories underlying the state and federal claims (1) . . . arise under different federal constitutional provisions (including different clauses in the same constitutional amendment, e.g., the due process and equal protection clauses of the 14th Amendment). . . ." *Id.* at 1367.

In this case, Petitioner argued about the meaning of "lewd exhibition of genitals" under the heading of an alleged Due Process violation, not a separate First Amendment violation. Although he discussed the First Amendment in his supplement to his sufficiency of the evidence enumeration of error, he also argued under the same enumeration of error about whether the statutory language of "lewd exhibition" could be treated as surplusage and whether the statute gave him "fair warning" of what was prohibited; he also discussed the Georgia Constitution, Georgia rules of statutory construction, whether lewdness is an objective or subjective concept, and whether circumstantial evidence can be used to

establish lewdness. (Resp't Ex. 6H, pp. 3-14). There was no mention of chilling protected speech.[9] Thus it can hardly be said that Petitioner made it clear under which federal constitutional theory he was arguing relief was warranted or that he explicitly raised all facets of his current First Amendment argument.

Moreover, the motion for reconsideration upon which Petitioner relies to argue that the Court of Appeals squarely addressed his First Amendment claims now raised was directed only to five Columbia County molestation (O.C.G.A. § 16-6-4) charges. Petitioner's argument concerning the use of the signal "E.g." and the inclusion of the word "exploitation" without statutory reference or reference to a specific indictment count is a transparent attempt to bootstrap claims that were not specifically brought to the attention of the Court of Appeals. (Doc. no. 22, p. 7). As discussed above, the claims must be sufficiently clear that the state courts can tell under what legal theory a petitioner is proceeding; it is not up to a state court to guess at which convictions or rulings are being challenged under a "for example" signal. Here, the ruling on the motion for reconsideration addressed only the convictions that were specifically listed on the face of Petitioner's motion for reconsideration: Counts 14, 15, 16, 17, and 18 of the Columbia County indictment. (Resp't Ex. 6K, 6L).

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9. Petitioner acknowledged that *Ferber* and *Osborne* were overbreadth challenges, but he then specifically stated that he was not challenging the constitutionality of the exploitation and molestation statutes. (Resp't Ex. 6H, pp. 3-4). He was challenging the manner in which the statutes had been applied to him. (*Id.* at 4).

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The Court of Appeals denied the motion based on an analysis of the sufficiency of the evidence concerning Petitioner's intent in photographing a minor child while the child was nude, as the claim was originally made under the Due Process rubric of sufficiency of the evidence:

> Craft, a child psychologist, committed the indecent act of taking nude photographs of prepubescent children whom he treated as patients. As we held in *Ney v. State*, 227 Ga. App. 496, 497(1) (489 SE2d 509) (1997), the intent with which one commits such an act can be inferred. Furthermore, in child molestation cases, evidence of other similar offenses against children is admissible to show the lustful disposition of the defendant. *Baker v. State*, 241 Ga. App. 666, 669(2) (527 SE2d 266 (1999). Here, hundreds of photographs of nude or partially nude children or their genitalia were admitted into evidence. Thus, the evidence was sufficient to support the trier of fact's inference that Craft took the photographs to satisfy his own sexual desires. Accordingly, the evidence was sufficient to support Craft's convictions and Craft's Motion for Reconsideration is HEREBY DENIED.

(Resp't Ex. 6L, pp. 1-2).

In sum, the Court concludes that Petitioner did not make the Georgia Court of Appeals explicitly aware of all of the aspects of his First Amendment issues raised in his federal petition. Moreover, he did not, as required by Georgia law,

raise his "as applied" First Amendment constitutional challenge at the first opportunity, i.e., before the verdict. While the Court of Appeals may have mentioned Petitioner's reference to the First Amendment in his motion for reconsideration, the court's ruling was based on a determination that there was sufficient evidence to establish Petitioner's criminal intent; there was no ruling on the belated "as applied" challenge.[10] However, as discussed in the next section, even if the Court assumes that Petitioner had properly presented all of his First Amendment arguments, he has not shown that the refusal of the state courts to grant relief was contrary to" clearly established Federal law.[11]

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10. The Court is aware that Petitioner has argued, "It is unlikely that three justices of the Georgia Supreme Court would have voted to grant certiorari if there had been a serious waiver issue." (Doc. no. 22, p. 11). As the Georgia Supreme Court denied certiorari without explanation, this statement is pure speculation. To quote the case upon which Petitioner bases so much of his argument concerning exhaustion, "The essence of unexplained orders is that they say nothing." *Ylst*, 501 U.S. at 804. The Court declines to engage in the rank speculation advocated by Petitioner concerning any of the motives of the Justices of the Georgia Supreme Court.

11. Commissioner Donald contends that only two of Petitioner's four First Amendment claims are properly before the Court: Georgia statutes were construed in an overly broad manner, and states cannot criminalize private thoughts. (Doc. no. 16, p. 12). The Commissioner denies that Petitioner timely challenged the Court of Appeals' decision not to conduct an "independent examination" of the evidence to determine if the challenged material was protected by the First Amendment and denies that Petitioner timely argued the decision of the Court of Appeals chills protected speech. (*Id.*). As discussed

(Cont'd)

2. Decision of Georgia Court of Appeals Is Not "Contrary to" Clearly Established Federal Law.

As discussed in Part II, *supra,* the Georgia Court of Appeals decision is "contrary to" clearly established federal law if it either (1) applied a rule that contradicts the governing law set forth by Supreme Court case law, or (2) when faced with materially indistinguishable facts, the state court arrived at a result different from that reached in a Supreme Court case. *Putman,* 268 F.3d at 1241. Importantly,

> [c]learly established federal law is *not* the case law of the lower federal courts, including this Court [the Eleventh Circuit]. Instead, in the habeas context, clearly established federal law "refers to the holdings, as opposed to the dicta, of [the Supreme Court's] decisions as of the time of the relevant state court decision."

Id.

Petitioner first argues, carefully avoiding the distinctions between the statutory requirements of his exploitation and molestation charges *see* doc. no. 2, pp. 18-20), that the Georgia courts have criminalized constitutionally protected speech; he generically contends that the state courts have

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(Cont'd)

above, the Court agrees that Petitioner failed to make it clear that all of his current First Amendment claims were to be considered outside the rubric of a Due Process argument concerning the sufficiency of the evidence. However, in an abundance of caution, the Court will consider whether Petitioner has shown that the Court of Appeals ruled on any of Petitioner's current claims in a manner "contrary to clearly established federal law."

refused to construe Georgia's molestation and exploitation statutes in harmony with the First Amendment. (Doc. no. 2, p. 18). He also cites general principles from Supreme Court cases that state child pornography must be defined so as to make clear what is prohibited and so as to avoid criminalizing protected speech.[12] (*Id.* at 19 (citing *New York v. Ferber*, 458 U.S. 747, 764, 773 (1982)). He also cites from the dissent in *Osborne v. Ohio*, 495 U.S. 103, 127 (1990) that "'nudity alone' does not place otherwise protected material outside the mantle of the First Amendment." Despite contending that his current First Amendment challenges are not to the constitutionality of the statutes under which he was convicted, (doc. no. 22, p. 13), these arguments bear a striking resemblance to traditional overbreadth challenges which seek to have a statute struck down on its face. *See, e.g., Ferber*, 458 U.S. at 768-69 & n.21. Those are not the arguments Petitioner made on his direct appeal: "Craft does not attack the constitutionality of the exploitation and molestation statutes. What he contends is that they have been unconstitutionally applied." (Resp't Ex. 6H, pp. 3-4).

Petitioner's argument on this point boils down to the assertion that the principles of these two cases must have been misapplied in his case because the Court of Appeals did not reverse all of his convictions under three different prongs of the exploitation statute and under the molestation statute. Petitioner repeatedly argues that the pictures for which he was convicted are not sexual, "do not remotely portray scatological eroticism," and are "indistinguishable

12. Notably, Petitioner's convictions were not for possession of "child pornography." They were for child molestation and sexual exploitation of children.

from the traditional image of a small child on a bearskin rug." (Doc. no. 22 pp. 11, 12, 13). Thus, goes the argument, Petitioner's convictions violate the Supreme Court's rule that "nudity alone" cannot destroy First Amendment protections.

Petitioner's rigid adherence to the "nudity alone" mantra and generic overbreadth arguments[13] ignores the fact that he was not convicted based solely on the existence of the images contained within the four corners of the photographs – there was an element of intent established.[14] The criminal intent takes Petitioner's convictions outside of the parameters of the "nudity alone" argument and provides the necessary notice of what the exploitation and molestation statutes prohibit. The photographs, along with Petitioner's intent – not "nudity alone" – led to Petitioner's convictions. Indeed, in *Ferber,* the Supreme Court cited statutory language of "lewd exhibition of the genitals" as a permissible regulation that comported with the requirement that criminal responsibility not be imposed without an element of scienter. *Ferber,* 458 U.S. at 765. Simply analogizing Petitioner's picture-taking to photographing a baby on a bearskin rug (doc. no. 2, p. 2) – without acknowledging the criminal intent that the trier of fact determined was involved in the picture

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13. After discussing the *Ferber* Court's rejection of the overbreadth argument before it, Petitioner states, "Notwithstanding that expression of confidence in the state courts, Georgia's courts have now given to the proscription on lewd exhibitions of the genitals a construction that is expansive indeed." (Doc. no. 2, p. 20).

14. The Court recognizes that Petitioner contends intent was not sufficiently established. That argument is discussed in detail in Part III.B, *infra.*

taking – falls woefully short of showing that the Georgia Court of Appeals has given an unconstitutionally expansive definition to the statutory language "lewd exhibition of genitals." Thus, Petitioner is not entitled to federal habeas relief on this claim.

Next, Petitioner claims that the Georgia Court of Appeals failed to conduct an independent examination of the photographs at issue in this case, choosing instead to rely on an allegedly ever-shifting, highly-deferential, any-evidence standard of review. (Doc. no. 2, pp. 11-13, 21). According to Petitioner, when the Court of Appeals affirmed his convictions by deciding that "any rational trier of fact could have found the evidence sufficient to support his various convictions" rather than by conducting an independent examination, it acted in dereliction of the Supreme Court mandate in *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485 (1984). In *Bose Corp.*, the Supreme Court stated: "And in its recent opinion identifying a new category of unprotected expression – child pornography – the Court expressly anticipated that an 'independent examination' of the allegedly unprotected material *may* be necessary 'to assure ourselves that the judgment . . . does not constitute a forbidden intrusion on the field of free expression.'" *Id.* at 507-08 (emphasis added).

Contrary to Petitioner's assertion, he has not cited any Supreme Court *holding* that requires a state court to automatically conduct an independent examination of the material in question to determine whether a conviction runs afoul of the First Amendment. A statement that an independent examination *may* be necessary is not a mandate

that one must be conducted. *Cf. Putman*, 268 F.3d at 1241 ("[I]n the habeas context, clearly established federal law refers to the holdings, as opposed to the dicta, of [the Supreme Court's] decisions as of the time of the relevant state court decision. (internal quotations omitted)). Here, the Court of Appeals did not find it necessary to conduct *a de novo* review of the materials in question in light of the hundreds of photographs from which Petitioner's intent could be inferred. *Craft*, 558 S.E.2d at 27. Likewise, a refusal to apply the six-part test for determining whether a visual depiction of a minor constitutes a "lascivious exhibition of the genitals or pubic area" from *United States v. Dost*, 636 F. Supp. 828 (S.D. Cal. 1986), a test formulated by the District Court of California that has not been adopted by the United States Supreme Court, cannot form the basis for federal habeas corpus relief.[15] Petitioner's argument on this point fails to show that by refusing to conduct an independent examination, the Court of Appeals acted contrary to clearly established Federal law.

Moving next to the assertion that the Court of Appeals impermissibly ruled in its Order denying the motion for reconsideration that a "lustful disposition" can transform an "innocuous photograph into child pornography," (doc. no. 2, p. 25), the Court first notes that Petitioner is attempting to sweep the molestation and exploitation charges under one heading, without recognizing the differences in the statutory

15. Even though Petitioner is incensed that Georgia would go against the grain of the "numerous jurisdictions" that have adopted the *Dost* factors (doc. no. 2, pp. 9-10), that does not change the conclusion that the United States Supreme Court has not made the *Dost* factors its test for evaluating the "lewd exhibition of genitals."

requirement for conviction under each statute. His broad allegation in his federal petition also ignores that the Court of Appeals addressed only the five molestation charges that he specifically raised in the motion for reconsideration, the ruling which Petitioner claims shows that the state courts have tried to "control thoughts."[16] (*Id.*). To the contrary, the Court of Appeals noted the statutory definition of child molestation, and correctly cited state law which provided that the intent with which a person acts, intent (to satisfy one's sexual desires) being one of the statutory requirements under O.C.G.A. § 16-6-4, maybe inferred; the court also correctly noted that evidence of other similar offenses against children was admissible to show lustful. (Resp't Ex. 6L). In light of the hundreds of photographs of nude or partially nude children or their genitalia that were admitted into evidence, the court reasonably concluded that the intent necessary to convict Petitioner on the five molestation charges had been sufficiently shown. (*Id.*).

Moreover, as to both the molestation and exploitation convictions, the Court rejects Petitioner's apparent attempt to argue that somehow his criminal intent, as found by the trier of fact, in photographing children in various states of nudity or photographing their genitalia should have no bearing on his convictions. There is no such mandate from the Supreme Court. Although Petitioner may disagree with the conclusions reached by the Court of Appeals about his intent, he has not established that the state courts improperly premised his convictions, any of his convictions, on the basis

16. The Court discusses Petitioner's failed attempt to bootstrap additional convictions into his motion for reconsideration at page 15, *supra*.

of an unconstitutional attempt to control his private thoughts. Clearly established Federal law does not require that state courts ignore the intent of a child molester or of a person who sexually exploits children.[17]

Finally, Petitioner contends that the decision by the Court of Appeals "chills" protected speech. According to Petitioner, the decision is "insensitiv[e] to the practicalities of photography." (Doc. no. 2, p. 26). Although Petitioner offers a general citation to the overbreadth doctrine prohibiting banning unprotected speech if a substantial amount of protected speech is prohibited in the process, he fails to identify any clearly established Federal law that requires a state court to excuse a violation of a criminal law because the actions precipitating the violations require "extensive practice." (*Id.* at 26-27). In Petitioners case, this "practice" apparently included taking photographs of children in various states of nudity and of taking pictures of children's exposed genitalia. Contrary to Petitioner's argument, the decision of the Court of Appeals did not erroneously assume that every photograph is a reliable indicator of the photographer's intent. Rather, the court stated that it relied on the hundreds of pictures presented at trial to infer Petitioner's intent in taking the pictures upon which his convictions for child molestation and sexual exploitation were based. *Craft,* 558 S.E.2d at 27. Petitioner has not established that any Supreme Court holding prevents a state court from considering intent when considering molestation and exploitation charges. Thus,

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17. Petitioner's argument that the determination of his intent was based on "exceedingly weak and unsatisfactory" evidence is discussed in detail, and rejected, in Part III.B, *infra.*

Petitioner is not entitled to federal habeas corpus relief on this point.

In sum, even if Petitioner is presumed to have fairly presented all of his First Amendment claims in the state courts, he has not shown that decision of the Georgia Court of Appeals is contrary to any clearly established Federal law as determined by the Supreme Court.

B. Ground II: Due Process Challenge Based on Determination of Intent

Petitioner next argues that his "Due Process rights have been violated because his convictions were affirmed on the basis of 'exceedingly weak and unsatisfactory' evidence of a lustful disposition." (Doc. no. 2, p. 27). According to Petitioner's argument, because the Supreme Court held in *In re Winship*, 397 U.S. 358, 364 (1970) that there must be "proof beyond a reasonable doubt of every fact necessary to constitute the crime with which [Petitioner] is charged," the state courts erred in ruling that the necessary criminal intent could be inferred from "exceedingly weak and unsatisfactory evidence." (Doc. no. 2, pp. 27-29 (citing *Craft v. State*, 558 S.E.2d at 27)). Respondent Donald contests that this stated ground for relief was exhausted; he contends that the issue should have been raised at the first possible opportunity, that is on the motion for reconsideration filed with the Court of Appeals. (Doc. no. 16, p. 19). The Court agrees that the issue was not exhausted, but it agrees for reasons different than those offered by Respondent Donald.

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While it is true that Petitioner did not raise his Due Process argument in his motion for reconsideration, under the Rules of the Court of Appeals of the State of Georgia, a "[m]otion for reconsideration is not a prerequisite for petition for certiorari." Ga. Ct. App. R. 38(a)(1). Moreover, Rule 37(e) explains that a motion for reconsideration will only be granted under certain tightly circumscribed circumstances. Ga. Ct. App. 37(e). Thus, the Court does not agree that the claim is precluded from federal review because it was not raised on the motion for reconsideration.

Rather, the first available opportunity for Petitioner to present his argument that the Court of Appeals utilized an improper standard of review for the sufficiency of the evidence was in his petition for certiorari. Upon review of the petition, the Court does not find anywhere that Petitioner made the Georgia Supreme Court aware that he was making a federal Due Process argument concerning the standard of review of the sufficiency of the evidence supporting his convictions. In his petition for certiorari, Petitioner argued that the Court of Appeals extended the law of child pornography "beyond its constitutional boundaries," (Resp't Ex. 11, p. 2), but those constitutional boundaries were identified as First Amendment boundaries. Nowhere in the brief does Petitioner discuss federal Due Process concerns or cite any case law now cited in support of this ground for relief. Moreover, the discussion of "weak and unsatisfactory" evidence in the petition for certiorari focuses on a rule from Georgia case law that "[c]ircumstantial evidence cannot sustain a conviction 'if the circumstances are reasonably consistent with the hypothesis of innocence, as well as the hypothesis of guilt. *Williams[on] v. State,* 191 Ga. App. 388,

389, 381 S.E.2d 766 (1989)." (Resp't Ex. 11, p. 4). Indeed, the heading under which the particular elements of Petitioner's argument on this point were raised states, "Constitutional issues aside, the decision below is an unwarranted expansion of the rule that weak and unsatisfactory evidence can prove intent." (*Id.* at 29). Again, the petition cites only Georgia case law; Petitioner did not make his federal Due Process argument or otherwise cite federal case law that would make it clear he was raising the federal Due Process argument he now attempts to raise.

As discussed above, in order to exhaust state remedies, a petitioner must make it clear in the state courts that he is raising a federal constitutional claim. *Zeigler,* 345 F.3d at 1307 ("[T]o exhaust state remedies, petitioners must do more than present 'the state courts only with the facts necessary to state a claim for relief' and must additionally articulate the constitutional theory serving as the basis for relief."). Here, when Petitioner challenged the standard of review utilized by the Georgia Court of Appeals, he did not make a federal Due Process argument. There is no citation to *Jackson v. Virginia,* 443 U.S. 307 or to *In re Winship,* 397 U.S. 358 (1970) in the petition for certiorari to the Georgia Supreme Court; there is no discussion of the proposition that the element of intent must be proved beyond a reasonable doubt in order to avoid running afoul of federal Due Process protections.[18] (Resp't Ex. 11).

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18. The Court also notes that in his reply to the State's petition for certiorari, Petitioner did not argue about federal Due Process considerations. (Resp't Ex. 10). Rather, he again discussed reliance on "weak and unsatisfactory" evidence as being contrary to "the

(Cont'd)

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Even if Petitioner had exhausted this Due Process argument in the Georgia courts, he has not shown that any state court decision was contrary to clearly established federal law. In his federal petition, Petitioner argues that his federal Due Process rights were violated because the state courts sustained his convictions on "exceedingly weak and unsatisfactory evidence" of a lustful disposition.[19] (Doc. no. 2, p. 27). However, a review of the Court of Appeals decision reveals that the court acknowledged that when the sufficiency of the evidence is challenged, "we use the test established in *Jackson v. Virginia* to determine whether the evidence was sufficient for any rational trier of fact to find the defendant guilty of the crimes charged.[20] *Craft*, 558 S.E.2d at 24. When

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Georgia rule" regarding circumstantial evidence, and the importance of honoring "the circumstantial-evidence rule" in First Amendment cases. (*Id.* at 12-13).

19. Petitioner does not identify exactly which convictions he is attempting to attack under this argument, but the "lustful disposition" language was used by the Court of Appeals in discussing the molestation Counts (14 through 18, 34, 35, 37 through 40, and 42) in the Columbia County indictment. *Craft*, 558 S.E. 2d at 27. However, the Court of Appeals also discussed inferring intent when reviewing several of the Richmond County counts of sexual exploitation. *Id.* at 26 (citing *Ney v. State*, 227 Ga. App. 496, 497, 489 S.E.2d 509 (1997)).

20. In *Jackson*, the Supreme Court held that the Fourteenth Amendment Due Process Clause mandates that no person shall be convicted unless the evidence is sufficient to convince the trier of fact beyond a reasonable doubt of the existence of every element of

(Cont'd)

evaluating the sufficiency of the evidence under the *Jackson* standard, the Court of Appeals utilized the standard of review for findings of fact made by the trier of fact: "Intent, which is a mental attitude, is commonly detectable only inferentially, and the law accommodates this. O.C.G.A. § 16-2-6." *Craft*, 558 S.E.2d at 26 (citing *Ney v. State*, 227 Ga. App. 496, 497, 489 S.E.2d 509, 513 (1997)). Under O.C.G.A. § 16-2-6, intention is a question of fact that may be decided "upon consideration of the words, conduct, demeanor, motive, and all other circumstances connected with the act for which the accused is prosecuted." Thus, from the face of the opinion of the Court of Appeals, it is clear that that court was aware of the proper standard for determining sufficiency of the evidence under *Jackson* and in reciting that a verdict would not be set aside if the factual finding on intent was based on "exceedingly weak and unsatisfactory evidence," it was simply stating the standard for analyzing factual findings on intent, not the standard for evaluating the overall sufficiency of the evidence supporting Petitioner's convictions.

Moreover, Petitioner's attempt to advance the argument that "'exceedingly weak and satisfactory'" evidence of a lustful disposition was used to sustain his convictions (again without distinction between the molestation and exploitation convictions) ignores the fact that the Court of Appeals did not say that the evidence of intent *in this case* was

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(Cont'd)

the offense. 443 U.S. 307, 316 (1979). Thus, the relevant question on review of a sufficiency of the evidence claim is whether "viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* at 319.

"exceedingly weak and unsatisfactory." To the contrary, a review of the Court of Appeals' first decision, as well as the decision on the motion for reconsideration, shows that when discussing "lustful disposition," the court relied on the admissibility of evidence of other similar offenses against children as a basis for showing lustful intent: "hundreds of photographs of nude or partially nude children or their genitalia were admitted into evidence." *Craft*, 558 S.E.2d at 27; doc. no. 1, Ex. B, Ruling on Motion for Reconsideration, pp. 1-2. There was also testimony presented at trial from one of the children depicted in the photographs at issue in this case, as well as from that child's mother and investigating law enforcement officials, from which the trier of fact could infer intent.

In sum, Petitioner has failed to establish that he is entitled to habeas corpus relief on ground two of his federal petition.

C. Ground III: Due Process Challenge Based on Insufficiency of Evidence on Counts Resting on Testimony of One Child

Finally, Petitioner contends that there was insufficient evidence to support his convictions as to the molestation charges in Counts 71 through 73 of the Columbia County indictment.[21] As recognized by the Georgia Court of Appeals, this claim is governed by the standard set forth by the Supreme Court in *Jackson v. Virginia*, 443 U.S. 307 (1979). As discussed in detail in note 20, *supra*, under *Jackson*, no person shall be convicted unless the evidence is sufficient to

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21. Exhaustion is not contested on this ground.

convince the trier of fact beyond a reasonable doubt of the existence of every element of the offense. *Id.* at 316. Thus, the relevant question on review of this third ground for relief is whether "viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* at 319. The Court is not required to "ask itself whether it believes that the evidence at the trial established guilt beyond a reasonable doubt," as it is the "responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Id.* at 318-19. The Court is also guided by the AEDPA's mandate that factual determinations made by a state court are presumptively correct unless rebutted by clear and convincing evidence. *See* 28 U.S.C. § 2254(e)(1).

On appeal, Petitioner challenged his convictions on Counts 71 through 73 of the Columbia County indictment on the ground that the verdict was "contrary to the evidence because the testimony and photographs of F.R. are insufficient to prove that [he] violated O.C.G.A. § 16-6-4." *Craft*, 558 S.E.2d at 28. After recounting that Count 71 charged Petitioner with knowingly committing the indecent act of showing a child a videotape of men and women engaged in sexual activity for the purpose of arousing Petitioner's or the child's sexual desires, the court found that the child "testified that he and [Petitioner] regularly watched videos at [Petitioner's] house and that on one occasion, they watched a video of adults engaging of sexual activity." *Id.* at 28. The Court of Appeals also re-iterated that the determination of Petitioner's intent in showing the video was a question of fact for the trier of fact that would not be set

aside unless it was clearly erroneous. As the Court had previously ruled that in child molestation cases, evidence of other similar offenses against children could be admitted to show intent, and as there had been other evidence admitted showing that Petitioner's activities with children had been done for the purpose of satisfying his sexual desires, *id.* at 27, the Court determined that there was sufficient evidence to support Petitioner's conviction on Count 71 for showing the videotape for the purpose of arousing Petitioner's or the child's sexual desires. *Id.* at 28. This Court agrees.

A review of the trial transcript shows that the child, F.R., testified that he watched an Oriental video with Petitioner at Petitioner's house in which he saw a male and female have sex; he also was able to see the "private parts" of the woman in the movie. (Trial Tr., ?). On cross-examination, F.R. again testified that when he watched the Oriental movie, he saw people engaged in sex. (*Id.* at 208). This evidence, combined with the requisite intent that the trier of fact was permitted to infer "upon consideration of the words, conduct, demeanor, motive, and all other circumstances connected with the act for which the accused is prosecuted," O.C.G.A. § 16-2-6 (cited in *Ney*, 489 S.E.2d at 513), provides sufficient support for the guilty verdict on Count 71.[22]

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22. As discussed previously, the evidence from which intent could be inferred included the hundreds of photos of nude children and/or their exposed genitalia, along with F.R.'s trial testimony concerning his interactions with Petitioner and that of F.R.'s mother and investigating law enforcement officials.

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Petitioner has not shown clear and convincing evidence to contradict the Court of Appeals' factual findings about the showing of the videotape and Petitioner's purpose in showing the video. The most Petitioner can offer is a suggestion about what the absence of certain evidence might mean; he does not offer any evidence of his own that contradicts the findings of the Court of Appeals. (Doc. no. 2, p. 30). That is not sufficient to warrant federal habeas relief.

As to Counts 72 and 73, the Court of Appeals determined:

> Craft is charged with fondling F.R.'s penis while bathing F.R. in the shower in Count 72 of the Columbia County indictment. F.R. testified that Craft was always with him in the bathroom when he took baths. Craft would wash F.R. with his hands, instead of a washcloth. When F.R. was asked what parts of his body Craft would wash, F.R. replied, "mainly my penis and my buttocks and probably my back." Any rational trier of fact could have found the evidence sufficient to support Craft's conviction on Count 72.
>
> In Count 73, Craft is charged with committing the indecent act of asking F.R. to masturbate for him while in Craft's home. F.R. testified that Craft videotaped or took pictures of him while F.R. showed him what he did to masturbate. When cross-examined about whether Craft asked him to masturbate, F.R. testified that he was sure that

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> Craft asked to watch F.R. masturbate after F.R. described how he did it.

Craft, 558 S.E.2d at 28.

Petitioner does not even attempt to rebut the evidence on those convictions with the "absence of evidence" red-herrings offered with respect to Count 71. In fact, there is no argument offered at all on the substance of Counts 72 and 73. (Doc. no. 2, pp. 30-31). Petitioner offers *nothing* to support his conclusory suggestion that the testimony of F.R., along with the intent that may be inferred from the circumstances connected with the acts for which Petitioner was prosecuted, *see* O.C.G.A. § 16-2-6, was insufficient to support Petitioner's molestation convictions on Counts 72 and 73. Thus, he is not entitled to habeas relief on these claims.

IV. CONCLUSION

For the reasons set forth above, the Court **REPORTS** and **RECOMMENDS** that the petition for habeas corpus relief be **DENIED**, that this civil action be **CLOSED**, and that a final judgment be **ENTERED** in favor of Respondents.

SO REPORTED and RECOMMENDED this 8th day of December, 2004, at Augusta, Georgia.

s/ W. Leon Barfield
W. LEON BARFIELD
UNITED STATES MAGISTRATE JUDGE

APPENDIX F — OPINION OF THE COURT OF APPEALS OF GEORGIA DATED JANUARY 31, 2002

COURT OF APPEALS OF THE STATE OF GEORGIA

ATLANTA, JAN 31, 2002

The Court of Appeals hereby passes the following order:

A01A0880, A01A0881. CRAFT v. THE STATE

Due to clerical error, it is hereby ordered that the opinion in the above-styled case attached hereto be substituted for the opinion previously issued on November 9, 2001.

Appendix F

FIRST DIVISION
BLACKBURN, C. J.,
POPE, P. J., MIKELL, J.

November 9, 2001

IN THE COURT OF APPEALS OF GEORGIA

A01A0880, A01A0881. CRAFT v. THE STATE

MIKELL, Judge.

After a bench trial, Dr. Robert Bruce Craft was convicted of 102 counts of sexual exploitation of a minor[1] and 15 counts of child molestation.[2] On appeal, Craft urges that we reverse either his convictions, or in the alternative, the denial of his amended motion for a new trial, arguing the following: (1) the verdicts on counts one through 45 of the Richmond County indictment and counts one through 70 of the Columbia County indictment are contrary to the evidence; (2) the photographic and videotaped evidence was not properly authenticated and its admission violated his constitutional rights; (3) the verdict is contrary to the evidence because the state failed to prove that the testimony or photographs of F.R., a minor child, violated OCGA § 16-6-4 in counts 34, 35, 37 through 40, 42, and 71 through 73 of the Columbia County indictment or that the photographs of D.S.,

1. Seventy-five of the 102 counts pertained to violations of OCGA § 16-12-100 (b) (5), 24 to violations of OCGA § 16-12-100 (b) (7), and 3 to violations of OCGA § 16-12-100 (b) (8).

2. OCGA § 16-6-4.

a minor child, violated OCGA § 16-6-4 in counts 14 through 18 of the Columbia County indictment; (4) the trial court erred in denying his motion to suppress all of the evidence; (5) the trial court erred when it denied his motion to examine and test evidence; and (6) the trial court failed to make the required findings of fact in regard to its denial of his motion for an appeal bond. For the reasons stated below, we affirm in part and reverse in part.

"On appeal the evidence must be viewed in the light most favorable to support the verdict, and appellant no longer enjoys a presumption of innocence; moreover, an appellate court determines evidence sufficiency and does not weigh the evidence or determine witness credibility."[3]

So viewed, the evidence shows that in June of 1996, Federal Bureau of Investigation Special Agent Keith Owens was contacted by the FBI's Charlotte division to determine whether Craft, who had had photographs developed at Fort Gordon, was a real person. Owens testified that he was given copies of 37 photos of a small boy lying on a sofa, most of which showed the boy cutting or stabbing at his erect penis with what appeared to be a knife. There was an adult in one of the photos with the small child. Owens learned that Craft, a child psychologist, was the adult in the photograph.

On September 20, 1996, Owens visited Craft's coworker, Dr. John McCormack, and showed him several of the pictures. When asked if there could be a reason that such photos had been taken, McCormack said that he did not know

3. (Citation omitted.) *Jones v. State*, 234 Ga. App. 571 (1) (507 SE2d 804) (1998).

of any, but hoped that there was an explanation. With McCormack's assistance, Owens decided when to approach Craft at his office to interview him. Owens met with Craft in Craft's office in Richmond County on October 1, 1996, and informed Craft that he needed to talk with him about some possible violations of laws governing sexual abuse. Owens also told Craft that he was not under arrest, would not be arrested at the conclusion of the interview regardless of what he said, and that he could ask Owens to leave at any time.

Owens showed Craft one of the pictures he had received from Charlotte. Craft identified the minor child in the photograph as C.G. and admitted that he had taken the photo in his office. Owens noticed a distinctive sofa and pillow in Craft's office that had appeared in most of the 37 photographs.[4] When Owens showed Craft the remaining pictures of C.G., Craft explained that "he took the pictures because he was amused and he was trying to understand why C.G. was doing what he was doing." Craft said that he had become very involved with photography over the previous five years, always had his camera nearby, and regularly took pictures of his child patients. Owens testified:

> He said that he had never taken nude or sexual pictures of other children except when occasionally

4. All but two of these exhibits are photographs of C.G. at various angles exposing his erect penis and a toy knife. In the two where his penis is not clearly exposed, he is jabbing at his pubic area with the toy knife. Exhibits 1 through 1 W were incorporated by reference into counts One through 24 of the Richmond County indictment.

a child would be hamming, as he called it, during a picture and pull his pants down. He denied ever having these children pose for the photographs and he denied that he'd ever touched them sexually or had them touch him sexually. He said that these were the most explicit photographs he'd ever taken of children. He advised that the original slides of these photographs of C.G. playing with the knife were at his home and any other photographs that he'd taken of children exposing their genitals and buttocks were at his home. He said he didn't take these pictures for any training purposes or for any professional study. He said he didn't want these photos to get out and they never did, and this was in reaction to — I asked him about if he'd put them on the Internet or shared them with friends, that type of thing. He said he — they never got out. He never wanted them to get out and they never did. He described the spontaneous photographs of children exposing themselves as cute and stated he found it intriguing what these children do. . . He said he never did get any sexual gratification from these photographs. He said that he had never masturbated while looking at these pictures. I asked him why would he take these pictures of other people's children with the genitals exposed and not share those with the family of these other children. He became a little bit defensive and stated two or three times that he could probably make a clinical argument for taking the pictures. He said — he admitted that a part of him said

> maybe he shouldn't do it and he knew they were inappropriate. He also mentioned that his colleagues would never understand. In the case of C.G., Dr. Craft described his interest in taking the pictures as morbid fascination with what C.G. was doing with the knife.

After the interview, Owens discussed the case with an Assistant United States Attorney, and they decided to investigate further. Consequently, they obtained search warrants over the weekend so that Craft would not have time to destroy the pictures. All of the warrants instructed the agents to search for:

> Any and all photographs or visual depictions of any kind, including computer generated matter of minors engaged in sexually explicit conduct; books; magazines; periodicals; films; videotapes; or other matter which contained any visual depiction of a minor engaged in sexually explicit conduct; receipts; canceled checks; money orders; and order forms which are evident of interstate transportation or mailings of film, books, magazines, periodical [sic], videotapes, or other matter which contains any visual depiction of a minor engaged in sexually explicit conduct; any records of treatment pertaining to C.G.; any undeveloped film which may contain visual depictions of a minor engaged in sexually explicit conduct; the toy knife depicted in photographs of C.G. reflected in attachment B; any diaries or writings describing any sexually explicit conduct by or with a minor.

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Owens executed search warrants on Craft's two offices, both in Richmond County, on October 4, 1996. No evidence was taken from his office at the Veteran's Administration hospital. At the office where Owens interviewed Craft, the agents seized message notes pertaining to C.G. but could not locate C.G.'s file. They also seized the toy knife and took photographs of that office.

Special Agent Harold Harrison, who executed the search warrant on Craft's residence in Columbia County on that same day, testified that his search team confiscated 27 boxes of evidence, the bulk of which was taken from two rooms, a computer room and a room containing a sofa and a projection screen. The boxes were taken to a secure room at the FBI office in Augusta and were turned over to Owens the next morning. There were approximately 37,000 photographs and slides in the boxes. Owens looked at every photograph and slide. Agent Harrison informed Owens that the team saw, but did not seize, several videotapes from Craft's house because they had seized so many photographs.

On October 21, Owens interviewed Jamie and Judy Rumbaugh, whose six children were patients of Craft's and with whom C.G. lived while initially under Craft's care. Owens showed the Rumbaughs approximately 350 photographs and slides of their children nude or partially nude. The Rumbaughs told Owens that Craft often had both his still camera and video camera at his office. Consequently, Owens added the information about the video camera to the original affidavit for the search warrant and obtained another search warrant to seize the videotapes.

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The second warrant authorized a search for "any and all homemade videotapes which may reasonably contain visual depictions of minors engaging in sexually explicit conduct; [and] any and all commercially made videotapes which contain visual depictions of minors engaged in sexually explicit conduct." The videotapes were seized from Craft's home on October 24, 1996.

After cataloguing the evidence he thought was incriminating, Owens obtained a subpoena to find out the identities of some of the children in the photographs. Pursuant thereto, Craft gave Owens their names, addresses and telephone numbers. Owens contacted the Department of Family and Children Services (the "Department") and learned that it had referred eighteen children to Craft. When he asked the Department for assistance with interviewing the children, he was referred to Investigator John Durden from the Georgia Bureau of Investigation.

Owens showed the pictures to Durden on March 5, 1998. After Durden discussed the case with the district attorney and a decision was made to prosecute the case at the state level, the GBI took possession of the photographs. Durden obtained arrest warrants from both Columbia and Richmond counties and search warrants for Craft's office and residence. He arrested Craft and searched Craft's residence on March 9, 1998, while another officer searched Craft's office.

Craft was indicted in Richmond County on 45 counts of sexual exploitation of a minor in violation of OCGA § 16-12-100 (b) (5) and one count of child molestation against

F.R. He was convicted of each count of sexual exploitation and the state withdrew the molestation charge. In Columbia County, Craft was indicted on 31 counts of sexual exploitation of a minor, in violation of OCGA § 16-12-100 (b) (5), 24 counts of sexual exploitation of a minor, in violation of OCGA § 16-12-100 (b) (7), three counts of sexual exploitation of a minor, in violation of OCGA § 16-12-100 (b) (8), and 15 counts of child molestation. He was convicted of each count, with the exception of one OCGA § 16-12-100 (b) (5) count. Craft agreed to waive the issue of venue with regard to the Columbia County indictment and to try both cases in Richmond County.

1. In his first enumeration of error, Craft argues that the verdict is contrary to the evidence because the state did not prove that the photographs attached as exhibits to counts one through 45 of the Richmond County indictment and as exhibits to counts one through 70 of the Columbia County indictment violated OCGA §§ 16-12-100 or 16-6-4. When the sufficiency of the evidence is challenged, we use the test established in *Jackson v. Virginia*,[5] to determine whether the evidence was sufficient for any rational trier of fact to find the defendant guilty of the crimes charged.

The indictments alleged violations of several sections of OCGA § 16-12-100, which provide, in relevant part:

> (b) (5) It is unlawful for any person knowingly to create, reproduce, publish, promote, sell, distribute, give, exhibit, or possess with intent to

5. 443 U.S. 307 (99 SC 2781, 61 LE2d 560) (1979).

> sell or distribute any visual medium which depicts a minor engaged in any sexually explicit conduct; (b) (7) It is unlawful for any person knowingly to bring or cause to be brought into this state any material which depicts a minor engaged in any sexually explicit conduct; (b) (8) It is unlawful for any person knowingly to possess or control any material which depicts a minor engaged in any sexually explicit conduct.

OCGA § 16-12-100 (a) (4) defines "sexually explicit conduct," in relevant part, as actual or simulated "C) masturbation; (D) lewd exhibition of the genitals or pubic area of any person; (H) defecation or urination for the purpose of sexual stimulation of the viewer."

Craft first argues that the state failed to prove that the photographs depicted a minor engaged in the "lewd exhibition of genitals." Because "lewd exhibition of genitals" has not been defined in Georgia, Craft contends that the trial court should have examined the six factors set forth in *U.S. v. Dost*[6] to determine whether the photographs were lewd.[7] We disagree. *Dost* interprets California law, and thus

6. 636 F. Supp. 828 (S.D.Cal. 1986).

7. The *Dost* factors are: 1) whether the focal point of the visual depiction is on the child's genitalia or pubic area; 2) whether the setting of the visual depiction is sexually suggestive, i.e., in a place or pose generally associated with sexual activity; 3) whether the child is depicted in an unnatural pose, or in inappropriate attire, considering the age of the child; 4) whether the child is fully or partially clothed, or nude; 5) whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity; 6) whether the visual depiction is intended or designed to elicit a sexual response in the viewer. Id. at 832.

is not controlling authority. Though the term has not been defined in Georgia, in *Unden v. State*,[8] we held, "[u]nless an act is found not to be lewd as a matter of law, whether such act is lewd under the attendant circumstances usually 'is best left to a jury for determination.'"[9] In this case, there was a bench trial. When the trial court sits as the trier of fact, "its findings are analogous to a jury verdict and will not be disturbed if there is any evidence to support them."[10]

a. Richmond County indictment

The Richmond County indictment charges 45 violations of OCGA § 16-12-100 (b) (5). In each count, with the exception of 23 and 24, Craft is charged specifically with creating "a photograph, depicting a minor child engaged in sexually explicit conduct, to wit: a lewd exhibition of genitals." We affirm counts one through 22, 30 through 35, 40 and 41. However, we reverse the convictions on counts 23 through 29, 36 through 39, and 42 through 45 because the evidence is insufficient to support these convictions.

The exhibits attached to counts one through 22 were among the 37 photographs that Owens initially showed Craft

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8. 218 Ga. App. 463 (462 SE2d 408) (1995) (appellant asserted as error the trial court's failure to charge the jury on the *Dost* factors and we stated that we were not deciding "whether a *Dost* factor charge is either appropriate or indispensable in sexual exploitation cases arising from an averred violation of Georgia law"). Id. at 466 (5).

9. Id. at 464 (2).

10. *Tuner v. State*, 233 Ga. App. 413 (504 SE2d 229) (1998).

during their interview. As Craft informed Owens, these photographs depicted C.G. as he played with his penis or with his penis and a rubber knife. The exhibits attached to counts 30 through 35 display a different minor, who has lowered his pants to show his penis. In the exhibits attached to counts 40 and 41, a minor female child is shown nude and in the process of taking off her clothes. Owens testified that the couch and a pillow in the photographs were in Craft's office when he interviewed him. We find that there is evidence sufficient to support Craft's convictions on these counts.

In Counts 23 and 24, the indictment charges Craft with creating a photograph depicting a minor child engaged in masturbation with a toy knife. In both photographs, the child's penis is not shown. In the first picture, he is pointing the knife at his penis through his shorts and in the other photo, he appears to be cutting at his penis with the knife. We find the evidence insufficient to support the convictions on these counts as there is no evidence that the child was simulating or actually engaging in masturbation.

The exhibits attached to counts 25 through 29, 36 through 39, and 42 through 45 are photographs of minor children who are wearing short pants and sitting down with their legs open. Due to the angle of the photograph, each child's genitals are partially or completely observable. However, the child is either innocently playing with something or just sitting, not engaging in the lewd exhibition of his or her genitals. The photographs evidence conduct by the defendant that was despicable and perverted; i.e., surreptitiously photographing

the genitals of children. However, the conduct is not within the precise language of the statute and the evidence is hence insufficient on those counts.

b. Columbia County indictment

Craft was convicted of violating OCGA § 16-12-100 (b) (5) in counts 1 through 13, 19 through 33, 41, and 67, OCGA § 16-12-100 (b) (7), in counts 43 through 63 and 68 through 70, OCGA § 16-12-100 (b) (8), in counts 64 through 66, and OCGA § 16-6-4 in counts 14 through 18, 34, 35, 37 through 40, and 42. We affirm Craft's convictions on counts 33, 44 through 46, 53, and 68, 14 through 18, 34, 35, 37 through 40, and 42. We reverse his convictions on counts 1 through 13, 19 through 32, 41, and 67; 43, 47 through 52, 54 through 63, 69, and 70; and 64 through 66.

In all but two of the counts charging violations of OCGA § 16-12-100 (b) (5), Craft was indicted for creating a visual medium that depicted a minor child engaged in sexually explicit conduct, specifically "lewd exhibition of genitals." We reverse Craft's convictions on counts 1 through 12, 19 through 32, 41 and 67, finding that as a matter of law, the photographs and videotape (Count 67) did not depict minors engaged in any sexually explicit conduct. Count 13 charges that Craft created a photograph of a child masturbating. The photograph depicts a minor child sitting with his legs open with his hands on either side of his underwear. The evidence is insufficient to support this conviction.

We affirm the conviction as to Count 33. In the exhibit attached to Count 33, F.R., the only child to testify at the trial, is sitting on a toilet. When asked what he was doing in

the picture, F.R. said that he was using the rest room. As utilized in OCGA § 16-12-100, sexually explicit conduct includes "defecation or urination for the purpose of sexual stimulation of the viewer."[11] Viewing the evidence in the light most favorable to the trial court's verdict, any rational trier of fact could have found the evidence sufficient to support this conviction.[12]

As stated earlier, OCGA § 16-12-100 (b) (7) provides that "it is unlawful for any person knowingly to bring or cause to be brought into this state any material which depicts a minor engaged in any sexually explicit conduct." The sexually explicit conduct referenced in counts 43, 47 through 63, and 68 through 70 is "lewd exhibition of genitals." The exhibits attached to counts 43 and 54 depict sleeping minor children, whose genitals are partially exposed. We reverse Craft's conviction on these counts. The exhibits attached to counts 47 through 52 and 55 through 63 depict children playing outside in a woody area in various stages of nudity. Owens testified that these photographs were marked "Smokey Mountains." Because the photographs display children before or after swimming, there is no evidence to support the trial court's finding that their nudity constituted a lewd exhibition of their genitals. Likewise, there is no evidence to support the trial court's finding that the photographs referenced in counts 69 and 70 of a partially nude minor child as he climbed a wall depicted a lewd exhibition of the genitals. Thus, Craft's convictions for these counts are also reversed.

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11. OCGA § 16-12-100 (a) (4) (H).

12. See *Short v. State*, 234 Ga. App. 633, 634 (1) (507 SE2d 514) (1998).

As to Count 53, however, the evidence shows a minor child with his underpants pulled down, pointing to his penis. A rational trier of fact could infer that the child was lewdly exhibiting his genitals, and hence the evidence was sufficient to support that count.

The exhibits serving as the basis for counts 44 through 46 depict minor boys who are urinating from a back and side angle. In the videotape that served as the basis for Count 68, the minor child is urinating outside and once he notices the camera, continues to urinate and smiles directly into the camera. Urinating is defined as a type of sexually explicit conduct. "Intent, which is a mental attitude, is commonly detectible only inferentially, and the law accommodates this."[13] Thus, the trier of fact could have inferred that Craft created these photographs for his own sexual gratification. Accordingly, we find the evidence sufficient to sustain a guilty verdict on these counts.

In Counts 64 through 66, Craft was charged with violations of OCGA § 16-12-100 (b) (8), which makes it unlawful to knowingly possess or control material depicting a minor engaged in any sexually explicit conduct. Investigator John Durden testified that he seized the photographs attached to counts 64 through 66 during his search of the Craft residence. These photographs depict a young boy who is sitting with his legs open and wearing swimming trunks. His genitals are partially exposed, apparently by accident, through the leg of his shorts. A rational trier of fact could

13. (Citations omitted.) *Ney v. State*, 227 Ga. App. 496, 497 (1) (489 SE2d 509) (1997).

not infer that the photographs depict a minor intentionally engaged in the lewd exhibition of his genitals. Therefore, we reverse Craft's convictions on these counts.

In Counts 14 through 18, 34, 35, 37 through 40, and 42, Craft is charged with violating OCGA § 16-6-4, which provides, "A person commits the offense of child molestation when he or she does any immoral or indecent act to or in the presence of or with any child under the age of 16 years with the intent to arouse or satisfy the sexual desires of either the child or the person."[14] In Counts 14 through 18, 34, 35, 37 through 40, the indecent or immoral act with which Craft is charged is photographing children while they were nude, for the purpose of satisfying his sexual desires. In Count 42, Craft is charged with committing the indecent act of photographing a child while the child was pulling down his pants and exposing and slapping his buttocks for the camera, for the purpose of satisfying Craft's sexual desires.

As stated earlier, intent can be inferred.[15]

> A reviewing court will not disturb a factual determination by the jury on intent unless it is contrary to the evidence and clearly erroneous. The intent with which an act is done is peculiarly a question of fact for determination by the jury and even when a finding that the accused had the

14. Counts 71 through 73 of the Columbia County indictment also allege violations of OCGA § 16-6-4, but Craft's first enumeration of error does not contest those counts.

15. *Ney*, supra.

> intent to commit the crime charged is supported by evidence which is exceedingly weak and unsatisfactory the verdict will not be set aside on that ground.[16]

Also, in child molestation cases, evidence of other similar offenses against children is admissible to show the lustful disposition of the defendant.[17] In this case, hundreds of photographs of nude or partially nude children or their genitalia were admitted into evidence. From this evidence, the trier of fact could infer that Craft took the photographs for the purpose of satisfying his sexual desires. Thus, we affirm the convictions on these counts.

2. In his second enumeration of error, Craft argues that the trial court erred by admitting all of the photograph and videotape evidence because it was not properly authenticated under OCGA § 24-4-48. We disagree.

"The admission of evidence lies within the sound discretion of the trial judge and will not be disturbed absent an abuse of discretion."[18] OCGA § 24-4-48, which addresses the admissibility of photographs and videotapes, provides, in relevant part, "For purposes of this Code section, 'unavailability of a witness' includes situations in which the authenticating witness is exempted by ruling of the court on

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16. (Citations omitted.) *Ney*, supra at 498 (1).

17. *Baker v. State*, 241 Ga. App. 666, 669 (2) (527 SE2d 266) (1999).

18. (Citation omitted.) *Williams v. State*, 272 Ga. 828, 829 (3) (537 SE2d 39) (2000).

the ground of privilege from testifying concerning the subject matter of the authentication."[19] Thus, under OCGA § 24-4-48, Craft is deemed unavailable as an authenticating witness because he cannot be compelled to testify due to his constitutional right against self-incrimination. However, the statute also provides that even though the authenticating witness is unavailable, subject to any other valid objection, photographs and videotapes are admissible when the court determines, based on competent evidence presented to it, that the items tend to show reliably the fact or facts for which they are offered.[20]

Through Owen's, Durden's, and Harrison's testimony, the state introduced hundreds of exhibits. In each instance, the officers testified that they seized the evidence from one of Craft's offices or his home, and were able to verify that the exhibits depicted Craft's office or home. Moreover, Craft admitted to Owens that he regularly took pictures of his child patients.

As the trier of fact, the trial judge is allowed to infer other related or connected facts from the direct evidence that it finds are reasonable and justified in the light of its experience.[21] Accordingly, we find that the trial court's decision to admit the evidence based upon its inference from

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19. OCGA § 24-4-48 (a) (1).

20. OCGA § 24-4-48 (b).

21. See generally *McGarity v. State*, 212 Ga. App. 17, 20 (3) (440 SE2d 695) (1994).

the officers' testimony that Craft took the photographs and videotapes was not an abuse of its discretion.

3. In his third enumeration of error, Craft argues that the verdict is contrary to the evidence because the testimony and photographs of F.R. are insufficient to prove that Craft violated OCGA § 16-6-4 in counts 34, 35, 37 through 40, 42, and 71 through 73 of the Columbia County indictment and that the photographs of D. S. are insufficient to prove that Craft violated OCGA § 16-6-4 in counts 14 through 18 of the Columbia County indictment. As we have affirmed counts 14 through 18, 34, 35, 37 through 40 and 42 in Division 1 of this opinion, we need not address these counts again here. As to counts 71 through 73, we affirm.

In Count 71, Craft is charged with knowingly committing the indecent act of showing to F.R. a videotape portraying men and women engaged in sexual activity for the purpose of arousing Craft's or F.R.'s sexual desires. F.R. testified that he and Craft regularly watched videos at Craft's house and that on one occasion, they watched a video of adults engaging in sexual activity. As discussed earlier in Division 1 (b), whether Craft had the requisite intent is a question of fact for jury determination, and the trier of fact's finding will not be set aside unless it is clearly erroneous.[22] The evidence was sufficient to support the trial judge's finding that on count 71, Craft was guilty of violating OCGA § 16-6-4.

Craft is charged with fondling F.R.'s penis while bathing F.R. in the shower in Count 72 of the Columbia County

22. *Ney*, supra at 498 (1).

indictment. F.R. testified that Craft was always with him in the bathroom when he took baths. Craft would wash F.R. with his hands, instead of a washcloth. When F.R. was asked what parts of his body Craft would wash, F.R. replied, "mainly my penis and my buttocks and probably my back." Any rational trier of fact could have found the evidence sufficient to support Craft's conviction on count 72.

In Count 73, Craft is charged with committing the indecent act of asking F.R. to masturbate for him while in Craft's home. F.R. testified that Craft videotaped or took pictures of him while F.R. showed him what he did to masturbate. When cross-examined about whether Craft asked him to masturbate, F.R. testified that he was sure that Craft asked to watch F.R. masturbate after F.R. described how he did it. Accordingly, the evidence was sufficient to convict Craft on count 73.

4. Next, Craft enumerates as error the trial court's denial of his motion to suppress all of the videotaped, photographic, and other evidence, arguing that all three searches of his home and both searches of his offices were not justified by probable cause. On appeal from a trial court's ruling on a motion to suppress, if "the evidence is uncontroverted and no question regarding the credibility of witnesses is presented, the trial court's application of the law to undisputed facts is subject to de novo review."[23]

Craft argues, citing no authority, that the first search warrants were not supported by probable cause because

23. (Citation omitted.) *State v. Mallard*, 246 Ga. App. 357 (541 SE2d 46) (2000).

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Owens should have done further independent investigation before seeking the warrants. Owens initially applied for search warrants to search Craft's two offices and his home on October 4, 1996. In his application for the warrants, Owens explained how he first came into possession of the 37 photographs. He also averred that Craft admitted that he had taken those photographs as well as photographs of other children exposing their genitals. Further, Craft stated that he kept the photographs and slides of the children at his home and that he had documented at least one child's behavior in his treatment files. Owens stated that he believed that Craft kept photographs of children at his home and two offices. Owens attached pictures to the affidavit and listed the items to be seized during the search. The magistrate issued the warrants and thousands of photographs and slides were seized.

"A search warrant must be supported by probable cause, or reasonable grounds, to believe that evidence of a crime will be found in a particular place."[24] Our duty in reviewing the magistrate's decision to issue a search warrant is to determine if the magistrate had a substantial basis for concluding that probable cause existed and to give substantial deference to the magistrate's finding."[25] Here, the magistrate had a substantial basis for concluding that probable cause existed. Accordingly, the trial court's denial of Craft's motion to suppress the evidence gathered as a result of the first searches was proper.

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24. (Citation omitted.) *State v. Staley*, 249 Ga. App. 207, 209 (548 SE2d 26) (2001).

25. *State v. Henderson*, 271 Ga. 264, 269 (4) (517 SE2d 61) (1999).

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On October 23, 1996, Owens sought a second warrant to search Craft's home for all home-made or commercially made videotapes depicting minors engaged in sexually explicit conduct. The supporting affidavit recited the same facts as the previous affidavit. In addition, it stated that Owens interviewed the parents of minor children who appeared nude or partially nude in several of the photographs and/or slides that had been seized and learned from them that Craft had also made videotapes of their children on many occasions. Craft argues that because the videotapes could have been seized pursuant to the first search warrant, there was no new probable cause to justify a second search. We disagree and find that the additional information provided in the supporting affidavit for the second search warrant provided a substantial basis for the magistrate to conclude that probable cause existed.

Finally, Craft contends that the third search of his home and second search of his office, both of which occurred on March 9, 1998, were not justified by probable cause because the evidence relied upon to obtain warrants for those searches was stale. In order to determine if the information relied upon in obtaining a search warrant is stale, we must "view the totality of the circumstances for indications of the existence of reasonable probability that the conditions referred to in the sworn testimony would continue to exist at the time of the issuance of the search warrant."[26]

GBI Agent Durden provided the supporting affidavits for the searches in question. In his affidavits, Durden averred

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26. (Citation omitted.) *Carruthers v. State*, 272 Ga. 306, 313 (5) (528 SE2d 217) (2000).

that on March 5, 1998, Owens showed him 500 to 700 pictures and told him that Craft admitted to taking photographs of children at his office, residence, and on camping trips. Owens also told him that one of Craft's neighbors saw him photographing a neighborhood child after the search warrants on his residence had been executed. For this reason, Owens told Durden that he believed that Craft continued to photograph children in his office in a sexually explicit manner and that Craft continued to treat some of the children depicted in the photographs and videotapes that had already been seized. Based on his training and experience as a child abuse specialist and on his interviews of child molesters and pedophiles, Durden averred that pedophiles and other individuals who prey upon children for their own sexual gratification rarely destroy the material that they collect. Further, Durden believed that items seized during a search would help the investigators to determine Craft's previous and current victims. After reviewing the totality of the circumstances, we find that the magistrate had sufficient evidence to conclude that there was a reasonable probability that the items to be seized remained in existence.

5. In his fifth enumeration of error, Craft argues that the trial court's denial of his motion to examine and test evidence violated his Fifth, Sixth, and Fourteenth Amendment rights as well as analogous provisions of the Georgia Constitution. We disagree. Citing no authority in support of his argument, Craft contends that his inability to review all of the photographs with his counsel prevented him from presenting a defense. Consequently, he maintains that the trial court only saw a very small number of the seized photographs and videotapes.

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"Our appellate courts have repeatedly affirmed that a trial court is vested with latitude to handle within its sound discretion pre-trial matters . . . [such as] motions for discovery."[27] Craft was represented by counsel in this matter, whose effectiveness he has not challenged, and who were authorized to act on his behalf. There is no allegation that Craft's counsel were not allowed to inspect all of the evidence, just that Craft was not with them when they inspected it. Craft does not have the right to represent himself and simultaneously be represented by counsel.[28]

Craft argues that his constitutional rights were violated because the court could not place the evidence in the proper perspective since it only saw the photographs the state chose to offer into evidence. The court is not constrained to view as a whole evidence pertaining to the sexual portrayals of children.[29] Thus, this enumeration lacks merit.

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27. (Citations and punctuation omitted.) *State v. Tuzman*, 145 Ga. App. 481, 483 (2) (243 SE2d 675) (1978).

28. (Citation omitted.) *Cargill v. State*, 255 Ga. 616, 622 (3) (340 SE2d 891) (1986).

29. *New York v. Ferber*, 458 U. S. 747, 764 (II) (C) (102 SC 3348, 73 LE2d 1113) (1982); But see *Miller v. California*, 413 U. S. 15, 24 (II) (93 SC 2607, 37 LE2d 419) (1973) (state statutes regulating adult pornography must be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value.)

6. In Craft's seventh enumeration of error, he argues that the trial court erred by failing to make the required findings of fact in connection with his appeal bond. We disagree.

"Granting or refusing to grant bail in non-capital felony cases after indictment and conviction is a matter within the sound discretion of the trial court; this Court will not control that discretion unless it has been flagrantly abused."[30]

> In exercising its discretion, the trial court must answer four questions: (1) whether there is a substantial risk the defendant will flee; (2) whether there is a substantial risk the defendant will pose a danger to others in the community; (3) whether there is a substantial risk the defendant will intimidate witnesses or otherwise interfere with the administration of justice; and (4) whether it appears the appeal is frivolous or taken only for the purpose of delay.[31]

In this case, the trial judge stated in an earlier bond proceeding that "I am of the opinion that the Defendant poses a danger to the community." After hearing counsel's argument on the motion for an appeal bond, the trial judge referenced the court's earlier denial of Craft's request for bond and stated that the only thing that had changed was the plethora of evidence against Craft that the court had considered during

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30. (Citation omitted.) *Williams v. State*, 228 Ga. App. 289, 290 (2) (491 SE2d 500) (1997).

31. (Citations omitted.) *Abernathy v. State*, 245 Ga. App. 857, 858 (539 SE2d 203) (2000).

the trial. The trial court ruled that even after considering the four factors, it was not appropriate to grant an appeal bond. An affirmative answer to any one of the four questions will support the denial of the bond.[32] Because the trial judge incorporated in the second bond proceeding his earlier finding that Craft posed a threat to the community, we affirm the trial court's denial of Craft's appeal bond.

7. As to Craft's sixth enumerated error, we addressed the issues raised therein in Divisions two, four, and five of this opinion.

Judgment affirmed in part; reversed in part. Blackburn, C. J., and Pope, P. J., concur.

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32. *Id.*

APPENDIX G — ORDER OF THE COURT OF APPEALS OF GEORGIA DENYING MOTION FOR RECONSIDERATION DATED DECEMBER 10, 2001

COURT OF APPEALS OF THE STATE OF GEORGIA

ATLANTA, DEC 10, 2001

The Court of Appeals hereby passes the following order:

A01A0880, A01A0881. CRAFT v. THE STATE.

On motion for reconsideration, Dr. Robert Bruce Craft urges us to reverse his convictions for child molestation on Counts 14, 15, 16, 17, and 18 of the Columbia County indictment. Craft argues that by affirming the convictions, we are holding that anyone who takes or possesses a photograph of a small child lying naked on a bear skin rug is subj[illegible] to prosecution as a child molester. Furthermore, in doing so he argues, we have disregarded the United States Supreme Court's mandate in *Osborn v. Ohio*, 495 U.S. 103, 127 (110 SC 1691, 109 LE2d 98) (1990) that "nudity alone does not place otherwise protected material outside the mantle of the First Amendment." We disagree.

In Counts 14 through 18, Craft is charged with violating OCGA § 16-6-4 by photographing a minor child while the child was nude, for the purposes of satisfying Craft's sexual desires. OCGA § 16-6-4 provides that "[a] person commits the offense of child molestation when he or she does any immoral or indecent act to or in the presence of or with any child under the age of 16 years with the intent to arouse or

satisfy the sexual desires of either the child or the person." Craft, a child psychologist, committed the indecent act of taking nude photographs of prepubescent children whom he treated as patients. As we held in *Ney v. State,* 227 Ga. App. 496, 497 (1) (489 SE2d 509) (1997), the intent with which one commits such an act can be inferred. Furthermore, in child molestation cases, evidence of other similar offenses against children is admissible to show the lustful disposition of the defendant. *Baker v. State,* 241 Ga. App. 666, 669 (2) (527 SE2d 266) (1999). Here, hundreds of photographs of nude or partially nude children or their genitalia were admitted into evidence. Thus, the evidence was sufficient to support the trier of fact's inference that Craft took the photographs to satisfy his own sexual desires. Accordingly, the evidence was sufficient to support Craft's convictions and Craft's Motion for Reconsideration is HEREBY DENIED.

APPENDIX H — ORDER OF THE SUPREME COURT OF GEORGIA DENYING PETITION FOR CERTIORARI DATED MAY 13, 2002

SUPREME COURT OF THE STATE OF GEORGIA
CLERK'S OFFICE
ATLANTA

DATE: May 13, 2002

Christopher J. McFadden
Suite 800, Commerce Plaza
755 Commerce Drive
Decatur, GA 300302627

Case No. S02C0654

ROBERT BRUCE CRAFT v. THE STATE

COURT OF APPEALS CASE NO. A01A0880 A01A0881

The Supreme Court today denied the petition for certiorari in this case.

All the Justices concur, except Fletcher, C.J., Sears, P.J., and Hunstein, J., who dissent.

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_____

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_____

Sherie M. Welch, Clerk

APPENDIX I — ORDER OF THE SUPREME COURT OF GEORGIA DENYING MOTION FOR RECONSIDERATION DATED JUNE 07, 2002

SUPREME COURT OF GEORGIA

Atlanta, June 07, 2002

Case No. S02C0654

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

ROBERT BRUCE CRAFT v. THE STATE

Upon consideration of the Motion for Reconsideration filed in this case, it is ordered that it be hereby denied.

All the Justices concur, except Fletcher, C.J., Sears, P.J., and Hunstein, J., who dissent.

APPENDIX J — INDICTMENTS

SECOND ORIGINAL
INDICTMENT

STATE OF GEORGIA, COLUMBIA COUNTY

IN THE SUPERIOR COURT OF SAID COUNTY

THE GRAND JURORS, selected, chosen and sworn for the County of Columbia, to-wit:

1. JOHN A. POPE, FOREPERSON
2. RONALD L. WEBER
3. KATHRYN MELCHER
4. ~~MARC TIMOTHY SIMONS~~ [excused - *KDM*]
5. ANN W. BRINSON
6. TERESA SLAY
7. LEIGH R. THOUVENOT
8. DEBRA K. ZAPATA
9. S. T. LOWE, JR.
10. CECIL CLIETT
11. GEO H. SLEISTER
12. DIANE O. SLEISTER
13. KATHERINE F. NOBLES
14. ALICIA SANDERLIN
15. WILLIAM F. GOLDEY
16. GREGORY H. BURT
17. LINDA T. SAMUELS

Appendix J

18. JANICE B. LUKE
19. ~~SHIRLEY W. BRACEWELL~~ [excused - *KDM*]
20. JESSE H. CLIATT
21. SANDRA D. THOMPSON
22. LARRY L. CRIPPS
23. ~~MARK H. ROPER, JR.~~ [excused - *KDM*]

in the name and behalf of the citizens of Georgia, charge and accuse **ROBERT BRUCE CRAFT** with the offense of **SEXUAL EXPLOITATION OF A MINOR (O.C.G.A. 16-12-100(b)(5)) (FELONY), SEXUAL EXPLOITATION OF A MINOR (O.C.G.A. 16-12-100(b)(7)) (FELONY), SEXUAL EXPLOITATION OF A MINOR (O.C.G.A. 16-12-100(b)(8)) (MISDEMEANOR), AND CHILD MOLESTATION (O.C.G.A. 16-6-4(A))** in the included counts 1-73. It is specifically alleged and materially averred for each count of this indictment that no person connected with or interested in the prosecution of this matter was aware of the behavior until after January 1, 1996.

Appendix J

COUNT 14

The Grand Jurors aforesaid, chosen and sworn for the county of Columbia in the name and on behalf of the citizens of Georgia, further charge and accuse **ROBERT BRUCE CRAFT** with the offense of **CHILD MOLESTATION (O.C.G.A. 16-6-4)(a) (FELONY)**, for that the said accused in the County of Columbia and State of Georgia, between the 1st day of January 1996 and the 31st day of May 1996, did knowingly commit an indecent act in the presence of a child, to-wit: David Paul Sellman, by photographing the child while he was nude, for the purposes of satisfying the sexual desires of the defendant as shown in exhibit 1M, contrary to the laws of said State, the good order, peace and dignity thereof,

STATE'S
EXHIBIT
1 m

Appendix J

COUNT 15

The Grand Jurors aforesaid, chosen and sworn for the county of Columbia in the name and on behalf of the citizens of Georgia, further charge and accuse **ROBERT BRUCE CRAFT** with the offense of **CHILD MOLESTATION (O.C.G.A. 16-6-4)(b) (FELONY)**, for that the said accused in the County of Columbia and State of Georgia, between the 1st day of January 1996 and the 31st day of May 1996, did knowingly commit an indecent act in the presence of a child, to-wit: David Paul Sellman, by photographing the child while he was nude, for the purposes of satisfying the sexual desires of the defendant as shown in exhibit 1N, contrary to the laws of said State, the good order, peace and dignity thereof,

STATE'S
EXHIBIT
IN

Appendix J

COUNT 16

The Grand Jurors aforesaid, chosen and sworn for the county of Columbia in the name and on behalf of the citizens of Georgia, further charge and accuse **ROBERT BRUCE CRAFT** with the offense of **CHILD MOLESTATION (O.C.G.A. 16-6-4)(a) (FELONY)**, for that the said accused in the County of Columbia and State of Georgia, between the 1st day of January 1996 and the 31st day of May 1996, did knowingly commit an indecent act in the presence of a child, to-wit: David Paul Sellman, by photographing the child while he was nude, for the purposes of satisfying the sexual desires of the defendant as shown in exhibit 1O, contrary to the laws of said State, the good order, peace and dignity thereof,

STATE'S
EXHIBIT
12

Appendix J

COUNT 17

The Grand Jurors aforesaid, chosen and sworn for the county of Columbia in the name and on behalf of the citizens of Georgia, further charge and accuse **ROBERT BRUCE CRAFT** with the offense of **CHILD MOLESTATION (O.C.G.A. 16-6-4)(a) (FELONY)**, for that the said accused in the County of Columbia and State of Georgia, between the 1st day of January 1996 and the 31st day of May 1996, did knowingly commit an indecent act in the presence of a child, to-wit: David Paul Sellman, by photographing the child while he was nude, for the purposes of satisfying the sexual desires of the defendant as shown in exhibit 1P, contrary to the laws of said State, the good order, peace and dignity thereof,

Appendix J

COUNT 18

The Grand Jurors aforesaid, chosen and sworn for the county of Columbia in the name and on behalf of the citizens of Georgia, further charge and accuse **ROBERT BRUCE CRAFT** with the offense of **CHILD MOLESTATION (O.C.G.A. 16-6-4)(a) (FELONY)**, for that the said accused in the County of Columbia and State of Georgia, between the 1st day of January 1996 and the 31st day of May 1996, did knowingly commit an indecent act in the presence of a child, to-wit: David Paul Sellman, by photographing the child while he was nude, for the purposes of satisfying the sexual desires of the defendant as shown in exhibit 1Q, contrary to the laws of said State, the good order, peace and dignity thereof,

STATE'S
EXHIBIT
15

Appendix J

COUNT 33

The Grand Jurors aforesaid, chosen and sworn for the county of Columbia in the name and on behalf of the citizens of Georgia, further charge and accuse **ROBERT BRUCE CRAFT** with the offense of **SEXUAL EXPLOITATION OF A MINOR (O.C.G.A. 16-12-100(b)(5)) (FELONY)**, for that the said accused in the County of Columbia and State of Georgia, between the 1st day of September 1995 and the 31st day of September 1995, did knowingly create a visual medium, to-wit: a photograph, depicting a minor child engaged in sexually explicit conduct, to wit: defecation, as shown in exhibit 2B, contrary to the laws of said State, the good order, peace and dignity thereof,

STATE'S
EXHIBIT
26

Appendix J

COUNT 34

The Grand Jurors aforesaid, chosen and sworn for the county of Columbia in the name and on behalf of the citizens of Georgia, further charge and accuse **ROBERT BRUCE CRAFT** with the offense of **CHILD MOLESTATION (O.C.G.A. 16-6-4)(A) (FELONY)**, for that the said accused in the County of Columbia and State of Georgia, between the 1st day of January 1996 and the 31st day of March 1996, did knowingly commit an indecent act in the presence of a child, to-wit: Forrest Raleigh, by photographing the child while he was nude, for the purposes of satisfying the sexual desires of the defendant as shown in exhibit 2C, contrary to the laws of said State, the good order, peace and dignity thereof,

STATE'S
EXHIBIT
1P

Appendix J

COUNT 35

The Grand Jurors aforesaid, chosen and sworn for the county of Columbia in the name and on behalf of the citizens of Georgia, further charge and accuse **ROBERT BRUCE CRAFT** with the offense of **CHILD MOLESTATION (O.C.G.A. 16-6-4)(A) (FELONY)**, for that the said accused in the County of Columbia and State of Georgia, between the 1st day of January 1996 and the 31st day of March 1996, did knowingly commit an indecent act in the presence of a child, to-wit: Forrest Raleigh, by photographing the child while he was nude, for the purposes of satisfying the sexual desires of the defendant as shown in exhibit 2D, contrary to the laws of said State, the good order, peace and dignity thereof,

Appendix J

COUNT 37

The Grand Jurors aforesaid, chosen and sworn for the county of Columbia in the name and on behalf of the citizens of Georgia, further charge and accuse **ROBERT BRUCE CRAFT** with the offense of **CHILD MOLESTATION (O.C.G.A. 16-6-4)(A) (FELONY)**, for that the said accused in the County of Columbia and State of Georgia, between the 1st day of January 1996 and the 31st day of March 1996, did knowingly commit an indecent act in the presence of a child, to-wit: Forrest Raleigh, by photographing the child while he was nude, for the purposes of satisfying the sexual desires of the defendant as shown in exhibit 2F, contrary to the laws of said State, the good order, peace and dignity thereof,

STATE'S
EXHIBIT
2. F

Appendix J

COUNT 40

The Grand Jurors aforesaid, chosen and sworn for the county of Columbia in the name and on behalf of the citizens of Georgia, further charge and accuse **ROBERT BRUCE CRAFT** with the offense of **CHILD MOLESTATION (O.C.G.A. 16-6-4)(A) (FELONY)**, for that the said accused in the County of Columbia and State of Georgia, between the 1st day of January 1996 and the 31st day of March 1996, did knowingly commit an indecent act in the presence of a child, to-wit: Forrest Raleigh, by photographing the child while he was nude, for the purposes of satisfying the sexual desires of the defendant as shown in exhibit 2J, contrary to the laws of said State, the good order, peace and dignity thereof,

STATE'S
EXHIBIT
25

Appendix J

COUNT 42

The Grand Jurors aforesaid, chosen and sworn for the county of Columbia in the name and on behalf of the citizens of Georgia, further charge and accuse **ROBERT BRUCE CRAFT** with the offense of **CHILD MOLESTATION (O.C.G.A. 16-6-4)(A) (FELONY)**, for that the said accused in the County of Columbia and State of Georgia, between the 1st day of January 1996 and the 31st day of March 1996, did knowingly commit an indecent act in the presence of a child, to-wit: Forrest Raleigh, by photographing the child the child was pulling down his pants and exposing and slapping his buttocks at the camera, for the purposes of satisfying the sexual desires of the defendant as shown in exhibit 2L, contrary to the laws of said State, the good order, peace and dignity thereof,

STATE'S
EXHIBIT
2L

Appendix J

COUNT 44

The Grand Jurors aforesaid, chosen and sworn for the county of Columbia in the name and on behalf of the citizens of Georgia, further charge and accuse **ROBERT BRUCE CRAFT** with the offense of **SEXUAL EXPLOITATION OF A MINOR (O.C.G.A. 16-12-100(b)(7)) (FELONY)**, for that the said accused in the County of Columbia and State of Georgia, between the 4th day of October, 1996 and the 1st day of January, 1994 did knowingly cause to be brought into the State a visual medium, to-wit: a photograph, depicting a minor child engaged in sexually explicit conduct, to wit: urination, as shown in exhibit 4, contrary to the laws of said State, the good order, peace and dignity thereof,

STATE'S
EXHIBIT
4

Appendix J

COUNT 45

The Grand Jurors aforesaid, chosen and sworn for the county of Columbia in the name and on behalf of the citizens of Georgia, further charge and accuse **ROBERT BRUCE CRAFT** with the offense of **SEXUAL EXPLOITATION OF A MINOR (O.C.G.A. 16-12-100(b)(7)) (FELONY)**, for that the said accused in the County of Columbia and State of Georgia, between the 4th day of October, 1996 and the 1st day of January, 1994 did knowingly cause to be brought into the State a visual medium, to-wit: a photograph, depicting a minor child engaged in sexually explicit conduct, to wit: urination, as shown in exhibit 5, contrary to the laws of said State, the good order, peace and dignity thereof,

STATE'S
EXHIBIT
7.c

STATE'S EXHIBIT
2-J

EXHIBIT
5
WHITE SOX
45

Appendix J

COUNT 46

The Grand Jurors aforesaid, chosen and sworn for the county of Columbia in the name and on behalf of the citizens of Georgia, further charge and accuse **ROBERT BRUCE CRAFT** with the offense of **SEXUAL EXPLOITATION OF A MINOR (O.C.G.A. 16-12-100(b)(7)) (FELONY)**, for that the said accused in the County of Columbia and State of Georgia, between the 4th day of October, 1996 and the 1st day of January, 1994 did knowingly cause to be brought into the State a visual medium, to-wit: a photograph, depicting a minor child engaged in sexually explicit conduct, to wit: urination, as shown in exhibit 6, contrary to the laws of said State, the good order, peace and dignity thereof,

STATE'S
EXHIBIT
6
HITE SOX
45

Appendix J

COUNT 53

The Grand Jurors aforesaid, chosen and sworn for the county of Columbia in the name and on behalf of the citizens of Georgia, further charge and accuse **ROBERT BRUCE CRAFT** with the offense of **SEXUAL EXPLOITATION OF A MINOR (O.C.G.A. 16-12-100(b)(7)) (FELONY)**, for that the said accused in the County of Columbia and State of Georgia, between the 4th day of October, 1996 and the 1st day of January, 1994 did knowingly cause to be brought into the State a visual medium, to-wit: a photograph, depicting a minor child engaged in sexually explicit conduct, to wit: a lewd exhibition of genitals, as shown in exhibit 13, contrary to the laws of said State, the good order, peace and dignity thereof,

STATE'S
EXHIBIT
13

Appendix J

COUNT 68

The Grand Jurors aforesaid, chosen and sworn for the county of Columbia in the name and on behalf of the citizens of Georgia, further charge and accuse **ROBERT BRUCE CRAFT** with the offense of **SEXUAL EXPLOITATION OF A MINOR (O.C.G.A. 16-12-100(b)(7)) (FELONY)**, for that the said accused in the County of Columbia and State of Georgia, between the 4th day of October, 1996 and the 1st day of January, 1994 did knowingly cause to be brought into the State a visual medium, to-wit: a videotape, depicting a minor child engaged in sexually explicit conduct, to-wit: a lewd exhibition of genitalia and urination, taken on a camping trip, contrary to the laws of said State, the good order, peace and dignity thereof,

Appendix J

COUNT 71

The Grand Jurors aforesaid, chosen and sworn for the county of Columbia in the name and on behalf of the citizens of Georgia, further charge and accuse **ROBERT BRUCE CRAFT** with the offense of **CHILD MOLESTATION (O.C.G.A. 16-6-4)(A) (FELONY)**, for that the said accused in the County of Columbia and State of Georgia, between the 1st day of January 1994 and the 4th day of October 1996, date not being more particularly known to the Grand Jury and the date of the offense not being known to law enforcement until before the 4th day of October, 1996, did knowingly commit an indecent act in the presence of a child, to-wit: Forrest Raleigh, by showing the child a certain videotape portraying images of certain men and women engaged in sexual activity and displaying genitalia, for the purpose of arousing the sexual desires of the child of the accused, contrary to the laws of said State, the good order, peace and dignity thereof,

Appendix J

COUNT 72

The Grand Jurors aforesaid, chosen and sworn for the county of Columbia in the name and on behalf of the citizens of Georgia, further charge and accuse **ROBERT BRUCE CRAFT** with the offense of **CHILD MOLESTATION (O.C.G.A. 16-6-4)(A) (FELONY)**, for that the said accused in the County of Columbia and State of Georgia, between the 1st day of January 1994 and the 4th day of October 1996, date not being more particularly known to the Grand Jury and the date of the offense not being known to law enforcement until before the 4th day of October, 1996, did knowingly commit an indecent act in the presence of a child, to-wit: Forrest Raleigh, by fondling the child's penis while bathing the child in the shower, for the purpose of arousing the sexual desires of the child of the accused, contrary to the laws of said State, the good order, peace and dignity thereof,

Appendix J

COUNT 73

The Grand Jurors aforesaid, chosen and sworn for the county of Columbia in the name and on behalf of the citizens of Georgia, further charge and accuse **ROBERT BRUCE CRAFT** with the offense of **CHILD MOLESTATION (O.C.G.A. 16-6-4)(A) (FELONY)**, for that the said accused in the County of Columbia and State of Georgia, between the 1st day of January 1994 and the 4th day of October 1996, date not being more particularly known to the Grand Jury and the date of the offense not being known to law enforcement until before the 4th day of October, 1996, did knowingly commit an indecent act in the presence of a child, to-wit: Forrest Raleigh, by requesting that the child masturbate for him while in the defendant's home, for the purpose of arousing the sexual desires of the child of the accused, contrary to the laws of said State, the good order, peace and dignity thereof.

SPECIAL AGENT JOHN DURDEN,
GEORGIA BUREAU OF INVESTIGATION
PROSECUTOR

Appendix J

INDICTMENT

STATE OF GEORGIA, RICHMOND COUNTY

IN THE SUPERIOR COURT OF SAID COUNTY

THE GRAND JURORS, selected, chosen and sworn for the County of Richmond, to-wit:

1. ANTHONY FRANKLIN, FOREPERSON
2. SAMUEL L. HICKSON
3. SHANE BOWER
4. HARVEY L. JOHNSON
5. TAMARA P. DENT
6. ANNETTE A. BUSH
7. DOY MATTHEW GAY, JR.
8. JOHN P. MASAK
9. WALTER C. HUNTER
10. ELIZABETH M. EDWARDS
11. EDWARD DUDLEY STULB
12. HENRY A. FREEMAN
13. WARREN E. LAMAR
14. JOHNNY HARMON, II
15. ZANE PATRICK LEIDEN
16. JENNIFER M. BRANN
17. ORETHA L. W. POLLARD
18. ROBERT A. FEAR

Appendix J

19. ~~ANNIE R. MILLER~~ A.F.
20. GEORGENE POWELL
21. _____
22. _____
23. _____

in the name and behalf of the citizens of Georgia, charge and accuse

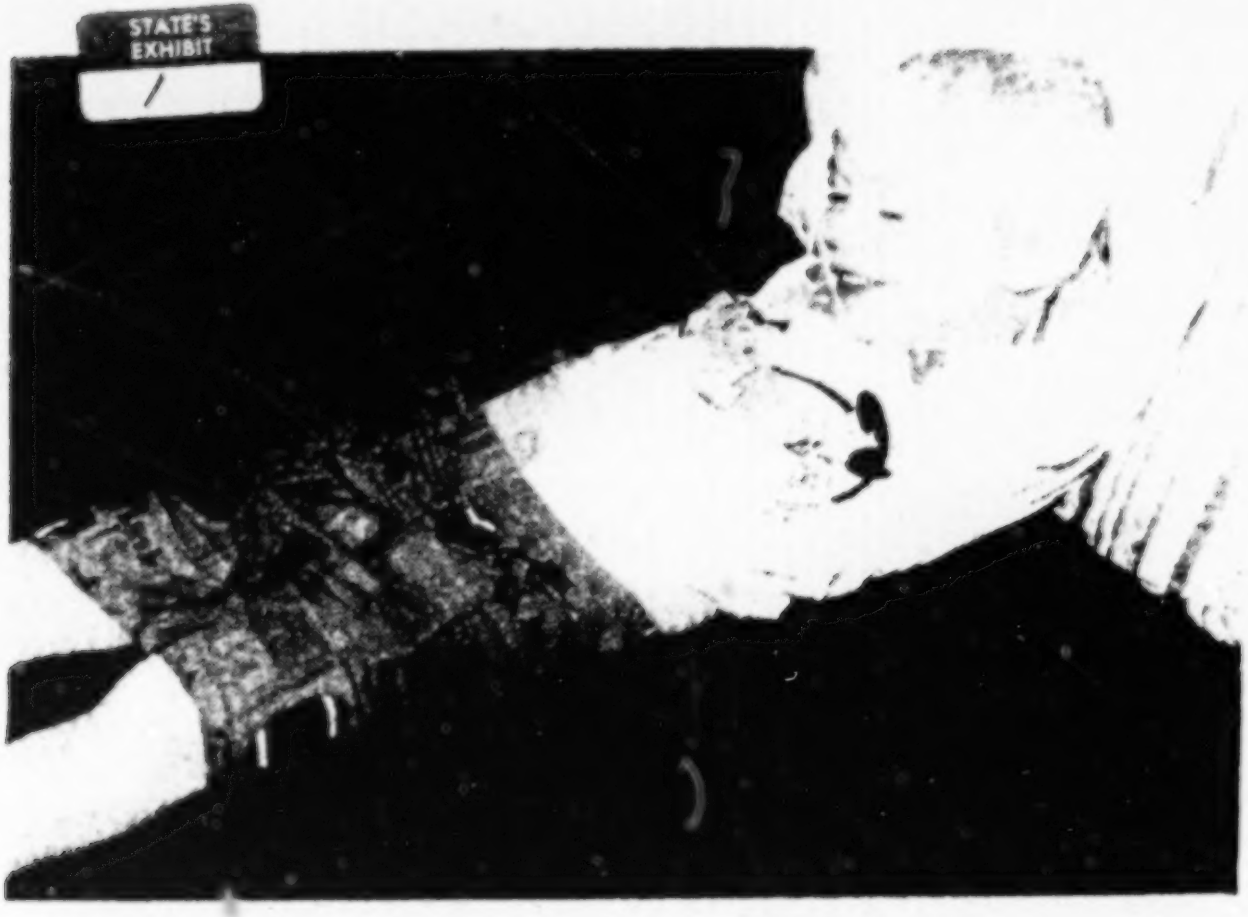
ROBERT BRUCE CRAFT

with the offenses of **SEXUAL EXPLOITATION OF A MINOR (O.C.G.A. 16-12-100(b)(5)) (45 counts) and CHILD MOLESTATION (O.C.G.A. 16-6-4(a) (1 count)**. It is specifically alleged as a material averment to each count of this indictment that no person concerned with or interested in the prosecution of this matter was aware of the behavior alleged until after January 1, 1996.

Appendix J

FIRST COUNT

The Grand Jurors aforesaid, chosen and sworn for the County of Richmond in the name and on behalf of the citizens of Georgia, charge and accuse **ROBERT BRUCE CRAFT** with the offense of **SEXUAL EXPLOITATION OF A MINOR (O.C.G.A. 16-12-100(b)(5)) (FELONY)**, for that the said accused in the County of Richmond and State of Georgia, between the 1st day of October, 1995 and the 31st of October, 1995, did create a visual medium, to wit: a photograph, depicting a minor child engaged in sexually explicit conduct, to wit: a lewd exhibition of genitals, as shown in Exhibit 1, contrary to the laws of said State, the good order, peace and dignity thereof.


STATE'S
EXHIBIT
1

Appendix J

SECOND COUNT

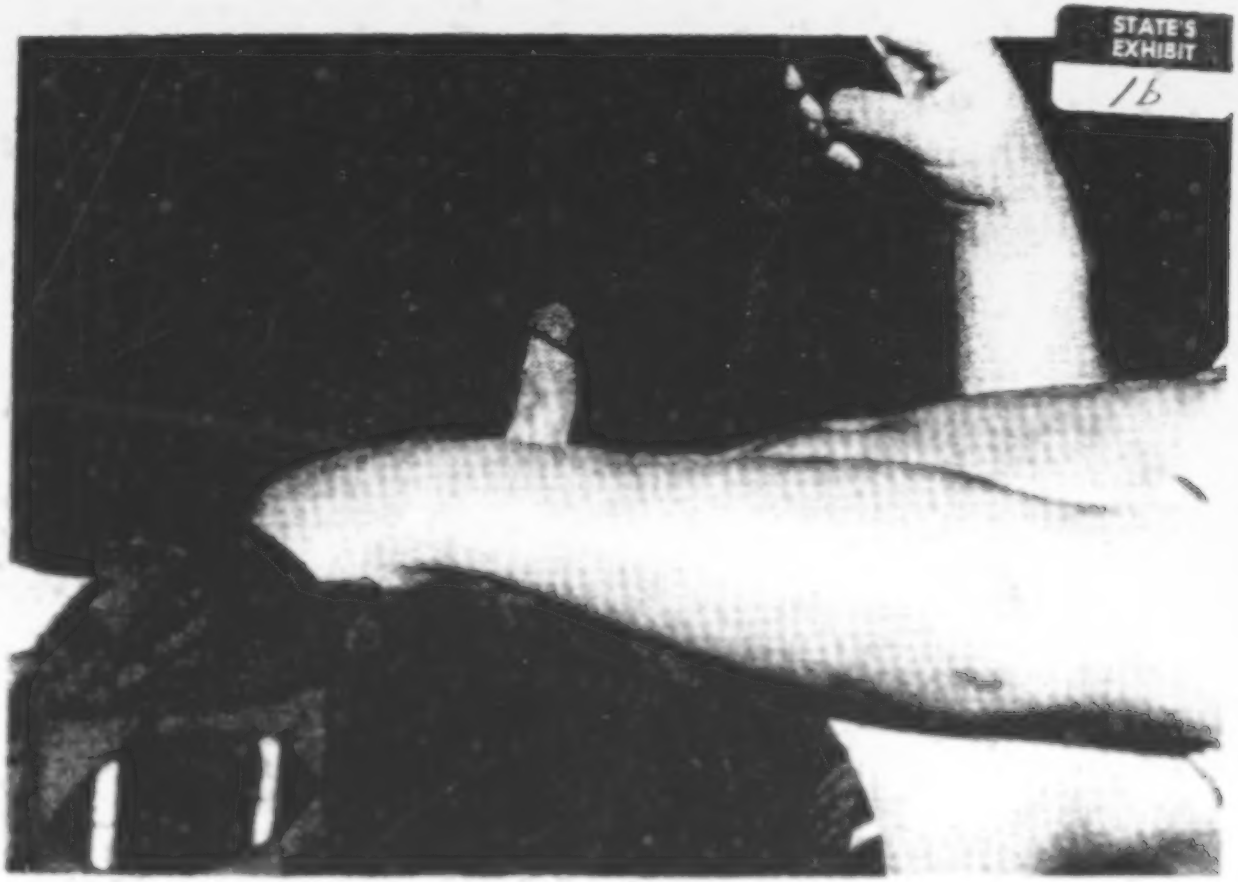
The Grand Jurors aforesaid, chosen and sworn for the County of Richmond in the name and on behalf of the citizens of Georgia, further charge and accuse **ROBERT BRUCE CRAFT** with the offense of **SEXUAL EXPLOITATION OF A MINOR (O.C.G.A. 16-12-100(b)(5)) (FELONY)**, for that the said accused in the County of Richmond and State of Georgia, between the 1st day of October, 1995 and the 31st of October, 1995, did create a visual medium, to wit: a photograph, depicting a minor child engaged in sexually explicit conduct, to wit: a lewd exhibition of genitals, as shown in Exhibit 1a, contrary to the laws of said State, the good order, peace and dignity thereof.

STATE'S
EXHIBIT
1a

Appendix J

THIRD COUNT

The Grand Jurors aforesaid, chosen and sworn for the County of Richmond in the name and on behalf of the citizens of Georgia, further charge and accuse **ROBERT BRUCE CRAFT** with the offense of **SEXUAL EXPLOITATION OF A MINOR (O.C.G.A. 16-12-100(b)(5)) (FELONY)**, for that the said accused in the County of Richmond and State of Georgia, between the 1st day of October, 1995 and the 31st of October, 1995, did create a visual medium, to wit: a photograph, depicting a minor child engaged in sexually explicit conduct, to wit: a lewd exhibition of genitals, as shown in Exhibit lb, contrary to the laws of said State, the good order, peace and dignity thereof.


STATE'S
EXHIBIT
16

Appendix J

FOURTH COUNT

The Grand Jurors aforesaid, chosen and sworn for the County of Richmond in the name and on behalf of the citizens of Georgia, further charge and accuse **ROBERT BRUCE CRAFT** with the offense of **SEXUAL EXPLOITATION OF A MINOR (O.C.G.A. 16-12-100(b)(5)) (FELONY)**, for that the said accused in the County of Richmond and State of Georgia, between the 1st day of October, 1995 and the 31st of October, 1995, did create a visual medium, to wit: a photograph, depicting a minor child engaged in sexually explicit conduct, to wit: a lewd exhibition of genitals, as shown in Exhibit 1c, contrary to the laws of said State, the good order, peace and dignity thereof.

Appendix J

FIFTH COUNT

The Grand Jurors aforesaid, chosen and sworn for the County of Richmond in the name and on behalf of the citizens of Georgia, further charge and accuse **ROBERT BRUCE CRAFT** with the offense of **SEXUAL EXPLOITATION OF A MINOR (O.C.G.A. 16-12-100(b)(5)) (FELONY)**, for that the said accused in the County of Richmond and State of Georgia, between the 1st day of October, 1995 and the 31st of October, 1995, did create a visual medium, to wit: a photograph, depicting a minor child engaged in sexually explicit conduct, to wit: a lewd exhibition of genitals, as shown in Exhibit 1d, contrary to the laws of said State, the good order, peace and dignity thereof.

STATE'S
EXHIBIT
1d

Appendix J

SIXTH COUNT

The Grand Jurors aforesaid, chosen and sworn for the County of Richmond in the name and on behalf of the citizens of Georgia, further charge and accuse **ROBERT BRUCE CRAFT** with the offense of **SEXUAL EXPLOITATION OF A MINOR (O.C.G.A. 16-12-100(b)(5)) (FELONY)**, for that the said accused in the County of Richmond and State of Georgia, between the 1st day of October, 1995 and the 31st of October, 1995, did create a visual medium, to wit: a photograph, depicting a minor child engaged in sexually explicit conduct, to wit: a lewd exhibition of genitals, as shown in Exhibit 1e, contrary to the laws of said State, the good order, peace and dignity thereof.

Appendix J

SEVENTH COUNT

The Grand Jurors aforesaid, chosen and sworn for the County of Richmond in the name and on behalf of the citizens of Georgia, further charge and accuse **ROBERT BRUCE CRAFT** with the offense of **SEXUAL EXPLOITATION OF A MINOR (O.C.G.A. 16-12-100(b)(5)) (FELONY)**, for that the said accused in the County of Richmond and State of Georgia, between the 1st day of October, 1995 and the 31st of October, 1995, did create a visual medium, to wit: a photograph, depicting a minor child engaged in sexually explicit conduct, to wit: a lewd exhibition of genitals, as shown in Exhibit 1f, contrary to the laws of said State, the good order, peace and dignity thereof.

STATE'S
EXHIBIT
1C

STATE'S
EXHIBIT
1e

Appendix J

EIGHTH COUNT

The Grand Jurors aforesaid, chosen and sworn for the County of Richmond in the name and on behalf of the citizens of Georgia, further charge and accuse **ROBERT BRUCE CRAFT** with the offense of **SEXUAL EXPLOITATION OF A MINOR (O.C.G.A.16-12-100(b)(5)) (FELONY)**, for that the said accused in the County of Richmond and State of Georgia, between the 1st day of October, 1995 and the 31st of October, 1995, did create a visual medium, to wit: a photograph, depicting a minor child engaged in sexually explicit conduct, to wit: a lewd exhibition of genitals, as shown in Exhibit 1g, contrary to the laws of said State, the good order, peace and dignity thereof.

Appendix J

NINTH COUNT

The Grand Jurors aforesaid, chosen and sworn for the County of Richmond in the name and on behalf of the citizens of Georgia, further charge and accuse **ROBERT BRUCE CRAFT** with the offense of **SEXUAL EXPLOITATION OF A MINOR (O.C.G.A. 16-12-100(b)(5)) (FELONY)**, for that the said accused in the County of Richmond and State of Georgia, between the 1st day of October, 1995 and the 31st of October, 1995, did create a visual medium, to wit; a photograph, depicting a minor child engaged in sexually explicit conduct, to wit: a lewd exhibition of genitals, as shown in Exhibit lh, contrary to the laws of said State, the good order, peace and dignity thereof.

Appendix J

TENTH COUNT

The Grand Jurors aforesaid, chosen and sworn for the County of Richmond in the name and on behalf of the citizens of Georgia, further charge and accuse **ROBERT BRUCE CRAFT** with the offense of **SEXUAL EXPLOITATION OF A MINOR (O.C.G.A. 16-12-100(b)(5)) (FELONY)**, for that the said accused in the County of Richmond and State of Georgia, between the 1st day of October, 1995 and the 31st of October, 1995, did create a visual medium, to wit: a photograph, depicting a minor child engaged in sexually explicit conduct, to wit: a lewd exhibition of genitals, as shown in Exhibit 1i, contrary to the laws of said State, the good order, peace and dignity thereof.

Appendix J

ELEVENTH COUNT

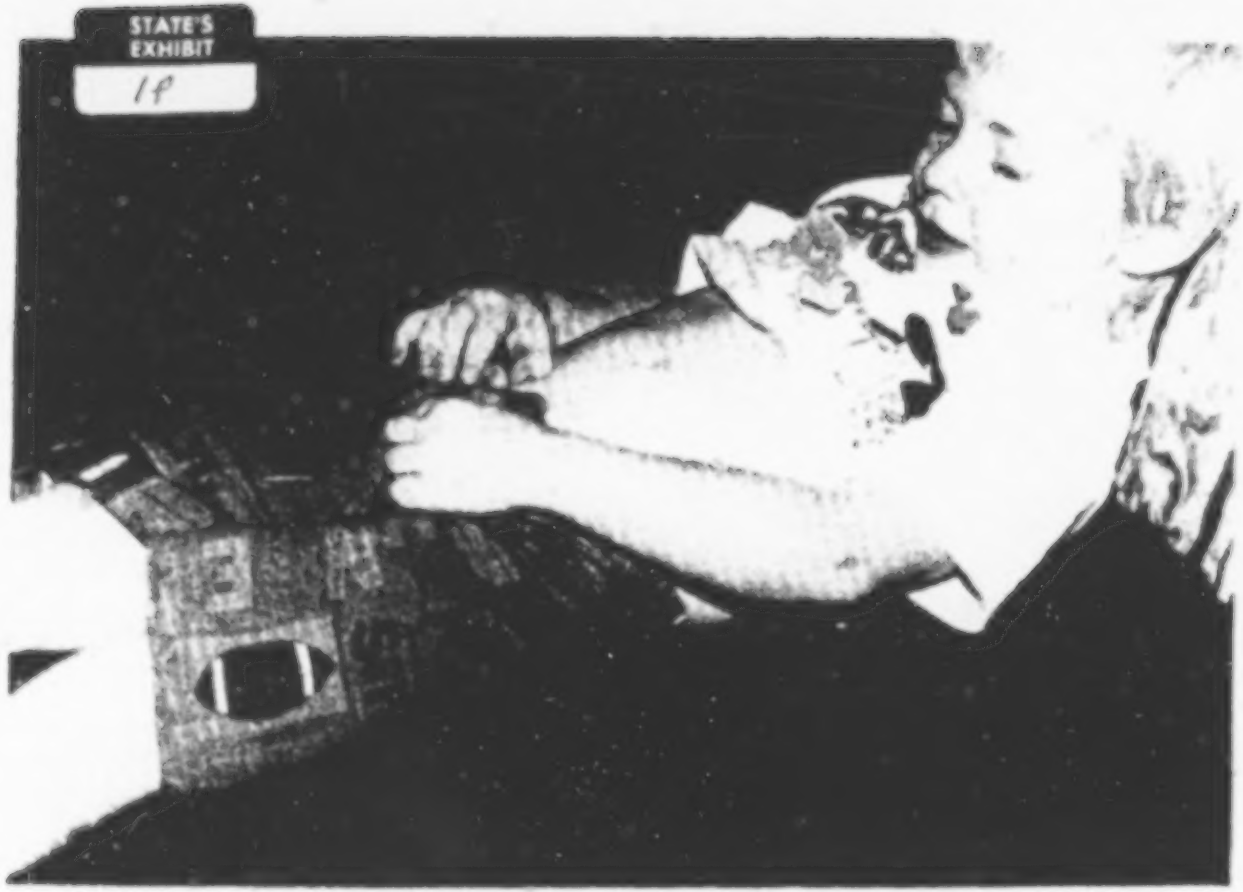
The Grand Jurors aforesaid, chosen and sworn for the County of Richmond in the name and on behalf of the citizens of Georgia, further charge and accuse **ROBERT BRUCE CRAFT** with the offense of **SEXUAL EXPLOITATION OF A MINOR (O.C.G.A. 16-12-100(b)(5)) (FELONY)**, for that the said accused in the County of Richmond and State of Georgia, between the 1st day of October, 1995 and the 31st of October, 1995, did create a visual medium, to wit: a photograph, depicting a minor child engaged in sexually explicit conduct, to wit: a lewd exhibition of genitals, as shown in Exhibit 1j, contrary to the laws of said State, the good order, peace and dignity thereof.

STATE'S
EXHIBIT
15

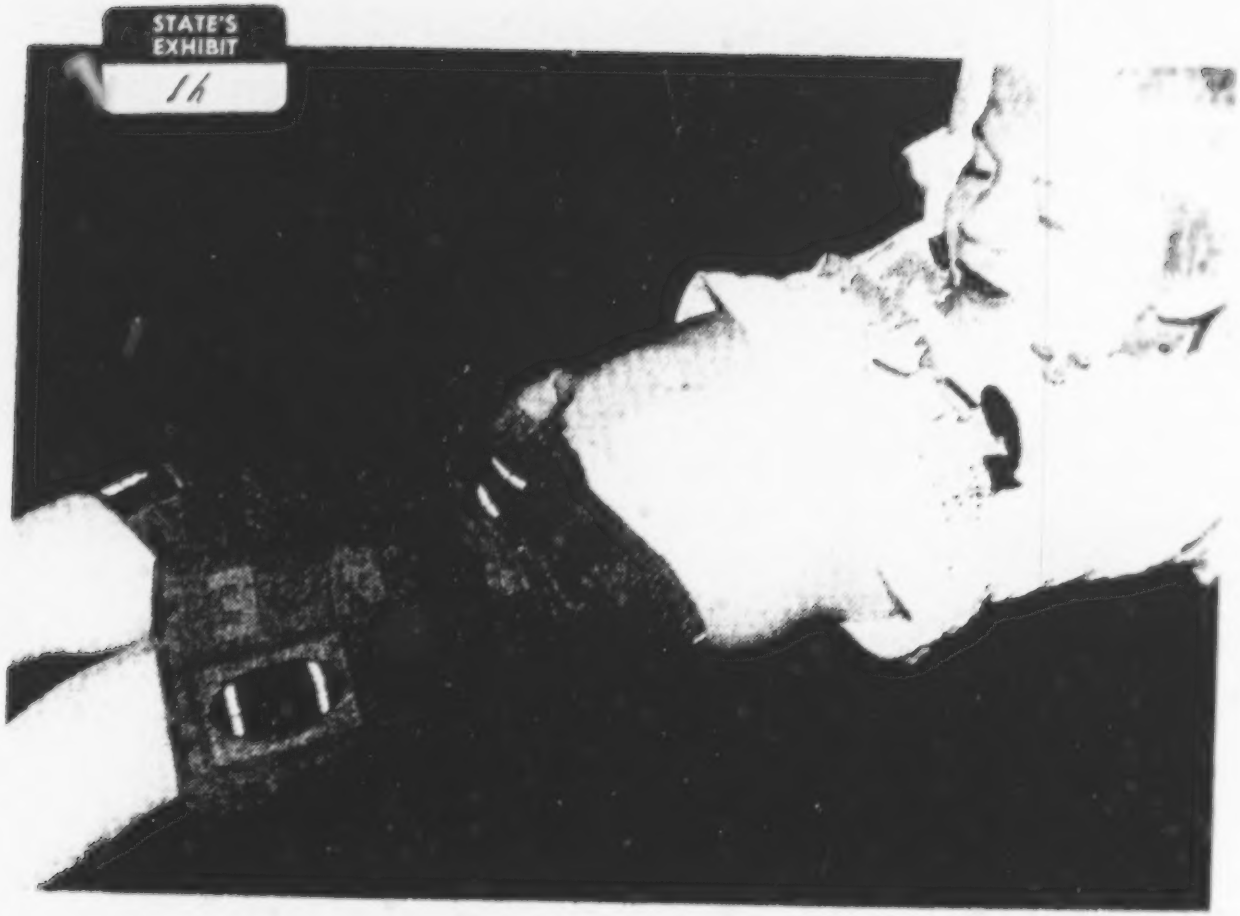
Appendix J

TWELFTH COUNT

The Grand Jurors aforesaid, chosen and sworn for the County of Richmond in the name and on behalf of the citizens of Georgia, further charge and accuse **ROBERT BRUCE CRAFT** with the offense of **SEXUAL EXPLOITATION OF A MINOR (O.C.G.A. 16-12-100(b)(5)) (FELONY)**, for that the said accused in the County of Richmond and State of Georgia, between the 1st day of October, 1995 and the 31st of October, 1995, did create a visual medium, to wit: a photograph, depicting a minor child engaged in sexually explicit conduct, to wit: a lewd exhibition of genitals, as shown in Exhibit 1k, contrary to the laws of said State, the good order, peace and dignity thereof.


STATE'S
EXHIBIT
1f

STATE'S
EXHIBIT
16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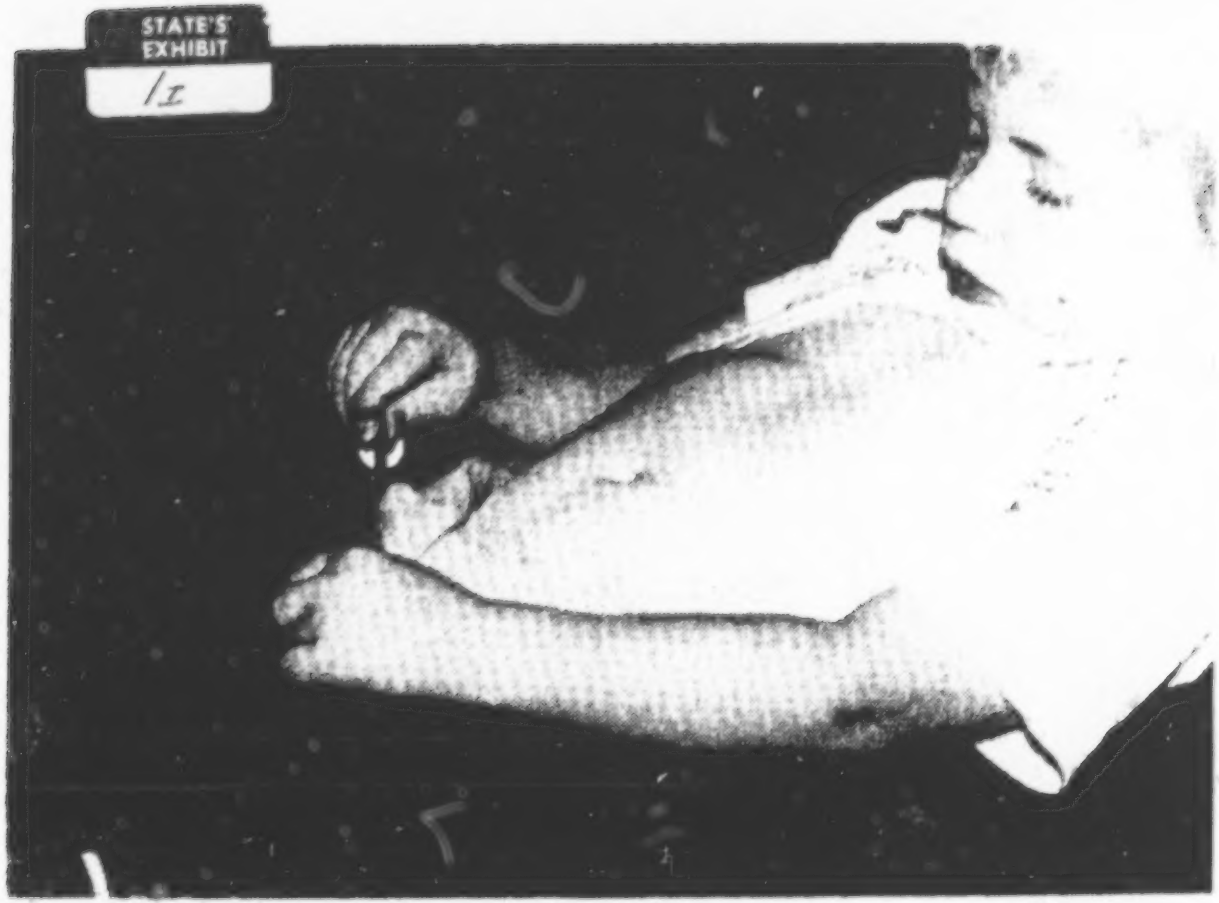
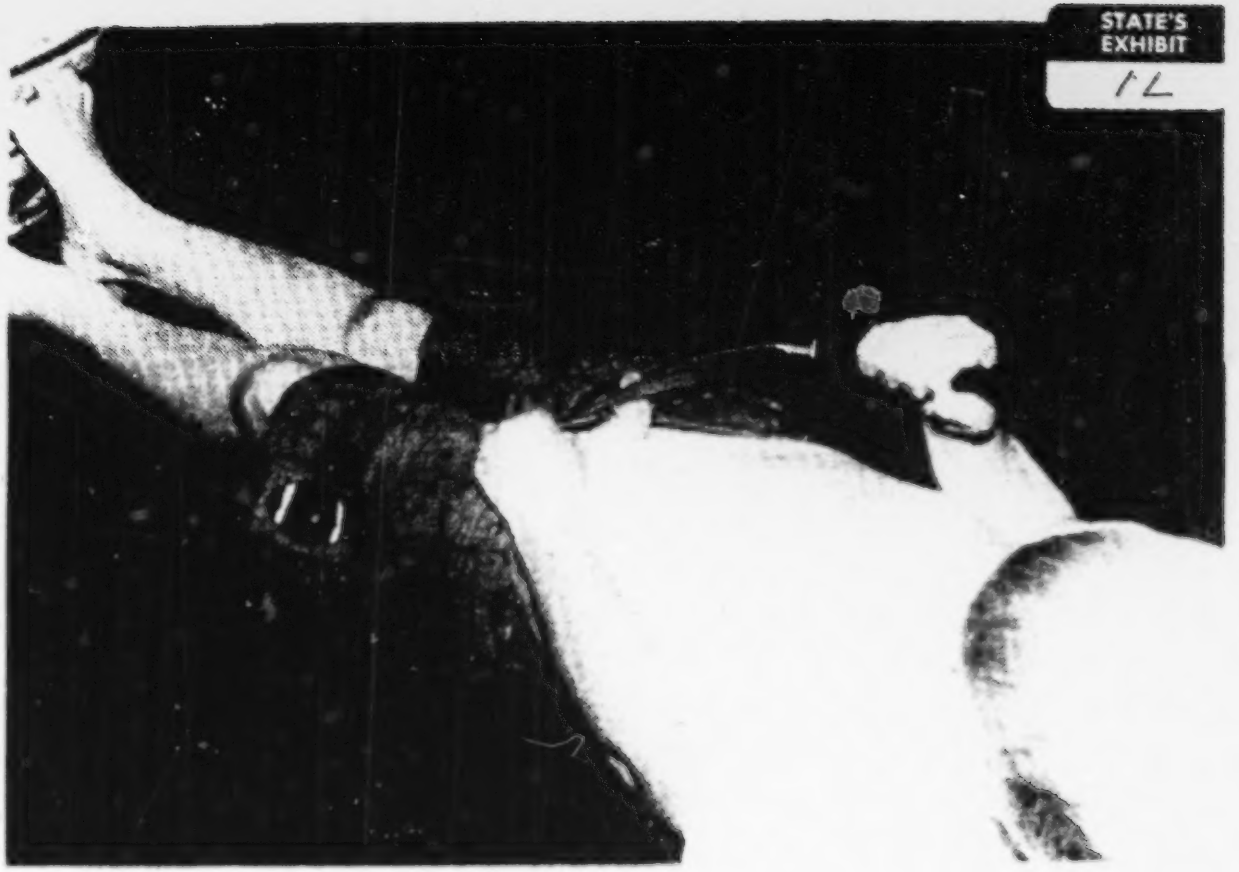

STATE'S
EXHIBIT
/I

Appendix J

THIRTEENTH COUNT

The Grand Jurors aforesaid, chosen and sworn for the County of Richmond in the name and on behalf of the citizens of Georgia, further charge and accuse **ROBERT BRUCE CRAFT** with the offense of **SEXUAL EXPLOITATION OF A MINOR (O.C.G.A. 16-12-100(b)(5)) (FELONY)**, for that the said accused in the County of Richmond and State of Georgia, between the 1st day of October, 1995 and the 31st of October, 1995, did create a visual medium, to wit: a photograph, depicting a minor child engaged in sexually explicit conduct, to wit: a lewd exhibition of genitals, as shown in Exhibit 11, contrary to the laws of said State, the good order, peace and dignity thereof.


STATE'S
EXHIBIT
12

Appendix J

FOURTEENTH COUNT

The Grand Jurors aforesaid, chosen and sworn for the County of Richmond in the name and on behalf of the citizens of Georgia, further charge and accuse **ROBERT BRUCE CRAFT** with the offense of **SEXUAL EXPLOITATION OF A MINOR (O.C.G.A. 16-12-100(b)(5)) (FELONY)**, for that the said accused in the County of Richmond and State of Georgia, between the 1st day of October, 1995 and the 31st of October, 1995, did create a visual medium, to wit: a photograph, depicting a minor child engaged in sexually explicit conduct, to wit: a lewd exhibition of genitals, as shown in Exhibit 1m, contrary to the laws of said State, the good order, peace and dignity thereof.

Appendix J

FIFTEENTH COUNT

The Grand Jurors aforesaid, chosen and sworn for the County of Richmond in the name and on behalf of the citizens of Georgia, further charge and accuse **ROBERT BRUCE CRAFT** with the offense of **SEXUAL EXPLOITATION OF A MINOR (O.C.G.A. 16-12-100(b)(5)) (FELONY)**, for that the said accused in the County of Richmond and State of Georgia, between the 1st day of October, 1995 and the 31st of October, 1995, did create a visual medium, to wit: a photograph, depicting a minor child engaged in sexually explicit conduct, to wit: a lewd exhibition of genitals, as shown in Exhibit 1n, contrary to the laws of said State, the good order, peace and dignity thereof.

STATE'S
EXHIBIT
/N

Appendix J

SIXTEENTH COUNT

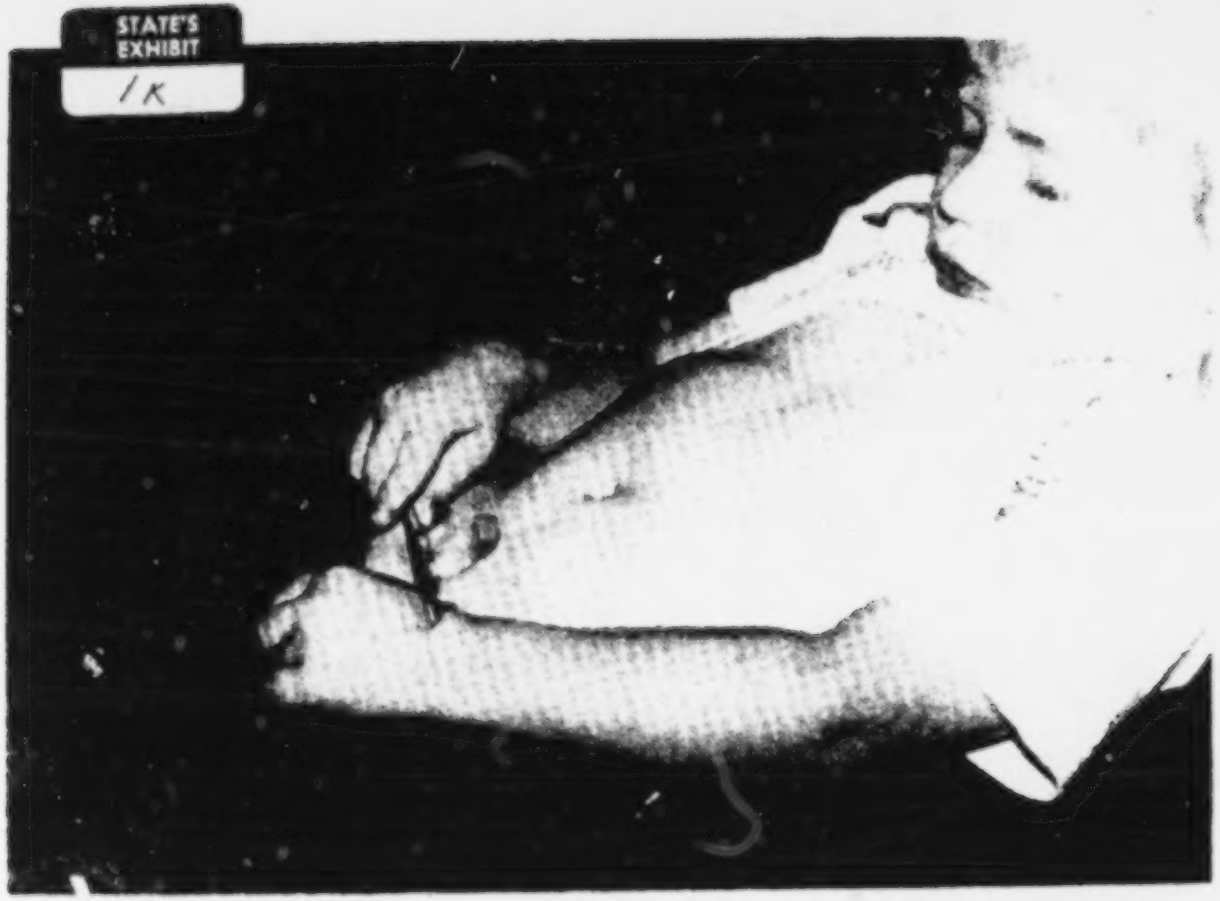
The Grand Jurors aforesaid, chosen and sworn for the County of Richmond in the name and on behalf of the citizens of Georgia, further charge and accuse **ROBERT BRUCE CRAFT** with the offense of **SEXUAL EXPLOITATION OF A MINOR (O.C.G.A. 16-12-100(b)(5)) (FELONY)**, for that the said accused in the County of Richmond and State of Georgia, between the 1st day of October, 1995 and the 31st of October, 1995, did create a visual medium, to wit: a photograph, depicting a minor child engaged in sexually explicit conduct, to wit: a lewd exhibition of genitals, as shown in Exhibit lo, contrary to the laws of said State, the good order, peace and dignity thereof.

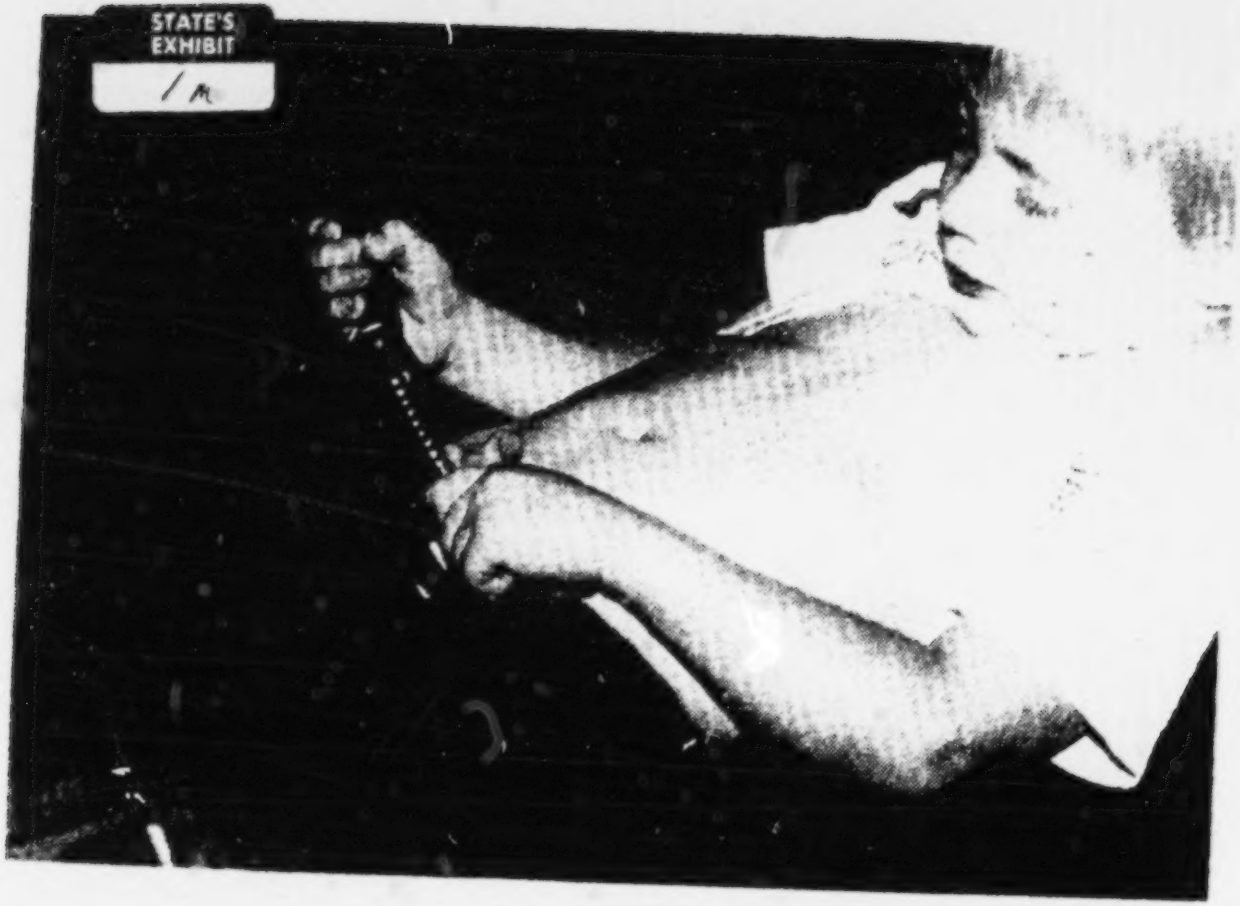
STATE'S
EXHIBIT
10

Appendix J

SEVENTEENTH COUNT

The Grand Jurors aforesaid, chosen and sworn for the County of Richmond in the name and on behalf of the citizens of Georgia, further charge and accuse **ROBERT BRUCE CRAFT** with the offense of **SEXUAL EXPLOITATION OF A MINOR (O.C.G.A. 16-12-100(6)(5)) (FELONY),** for that the said accused in the County of Richmond and State of Georgia, between the 1st day of October, 1995 and the 31st of October, 1995, did create a visual medium, to wit: a photograph, depicting a minor child engaged in sexually explicit conduct, to wit: a lewd exhibition of genitals, as shown in Exhibit 1p, contrary to the laws of said State, the good order, peace and dignity thereof.


STATE'S
EXHIBIT
1K


STATE'S
EXHIBIT
1M

STATE'S
EXHIBIT
1P

Appendix J

EIGHTEENTH COUNT

The Grand Jurors aforesaid, chosen and sworn for the County of Richmond in the name and on behalf of the citizens of Georgia, further charge and accuse **ROBERT BRUCE CRAFT** with the offense of **SEXUAL EXPLOITATION OF A MINOR (O.C.G.A. 16-12-100(b)(5)) (FELONY)**, for that the said accused in the County of Richmond and State of Georgia, between the 1st day of October, 1995 and the 31st of October, 1995, did create a visual medium, to wit: a photograph, depicting a minor child engaged in sexually explicit conduct, to wit: a lewd exhibition of genitals, as shown in Exhibit 1q, contrary to the laws of said State, the good order, peace and dignity thereof.

Appendix J

NINETEENTH COUNT

The Grand Jurors aforesaid, chosen and sworn for the County of Richmond in the name and on behalf of the citizens of Georgia, further charge and accuse **ROBERT BRUCE CRAFT** with the offense of **SEXUAL EXPLOITATION OF A MINOR (O.C.G.A. 16-12-100(b)(5)) (FELONY)**, for that the said accused in the County of Richmond and State of Georgia, between the 1st day of October, 1995 and the 31st of October, 1995, did create a visual medium, to wit: a photograph, depicting a minor child engaged in sexually explicit conduct, to wit: a lewd exhibition of genitals, as shown in Exhibit lr, contrary to the laws of said State, the good order, peace and dignity thereof.

Appendix J

TWENTIETH COUNT

The Grand Jurors aforesaid, chosen and sworn for the County of Richmond in the name and on behalf of the citizens of Georgia, further charge and accuse **ROBERT BRUCE CRAFT** with the offense of **SEXUAL EXPLOITATION OF A MINOR (O.C.G.A. 16-12-100(b)(5)) (FELONY)**, for that the said accused in the County of Richmond and State of Georgia, between the 1st day of October, 1995 and the 31st of October, 1995, did create a visual medium, to wit: a photograph, depicting a minor child engaged in sexually explicit conduct, to wit: a lewd exhibition of genitals, as shown in Exhibit 1s, contrary to the laws of said State, the good order, peace and dignity thereof.

Appendix J

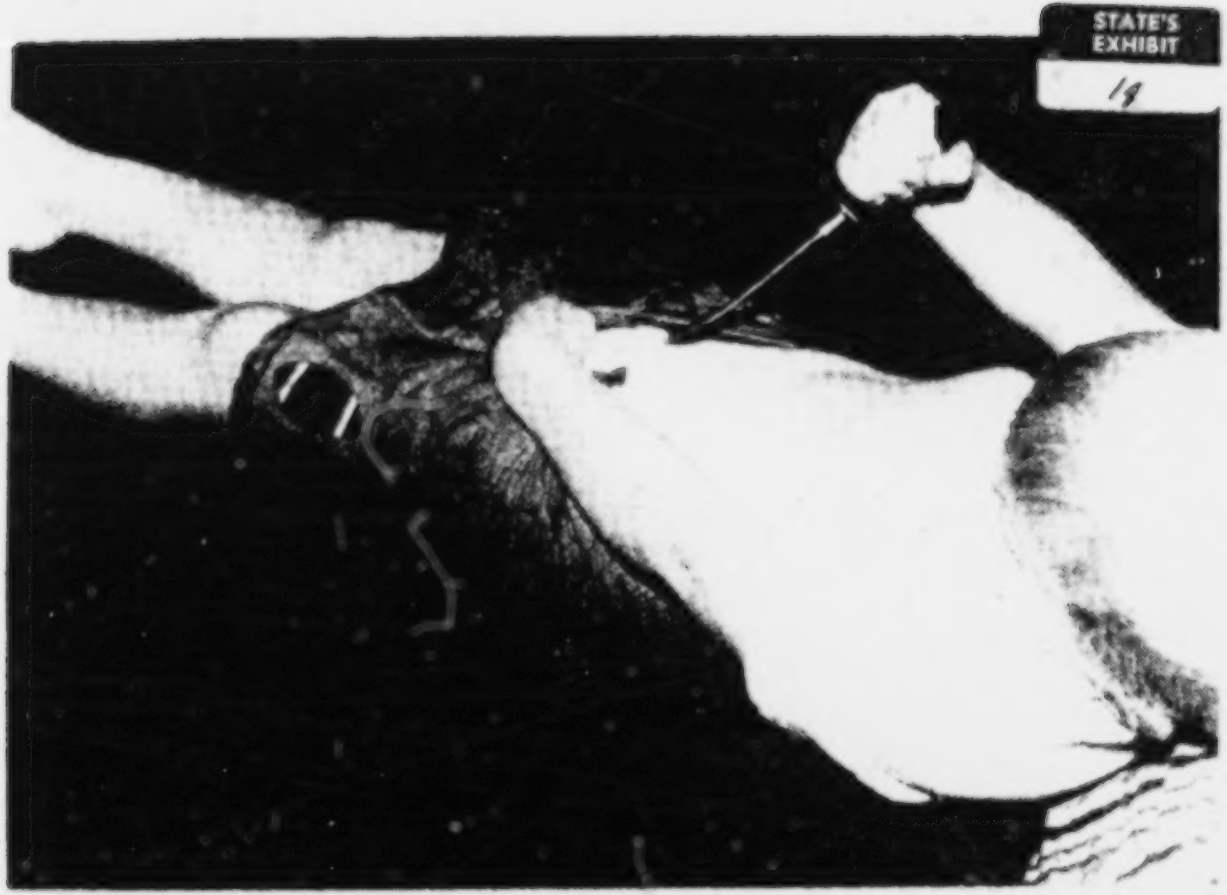
TWENTY-FIRST COUNT

The Grand Jurors aforesaid, chosen and sworn for the County of Richmond in the name and on behalf of the citizens of Georgia, further charge and accuse **ROBERT BRUCE CRAFT** with the offense of **SEXUAL EXPLOITATION OF A MINOR (O.C.G.A. 16-12-100(b)(5)) (FELONY)**, for that the said accused in the County of Richmond and State of Georgia, between the 1st day of October, 1995 and the 31st of October, 1995, did create a visual medium, to wit: a photograph, depicting a minor child engaged in sexually explicit conduct, to wit: a lewd exhibition of genitals, as shown in Exhibit lt, contrary to the laws of said State, the good order, peace and dignity thereof.

Appendix J

TWENTY-SECOND COUNT

The Grand Jurors aforesaid, chosen and sworn for the County of Richmond in the name and on behalf of the citizens of Georgia, further charge and accuse **ROBERT BRUCE CRAFT** with the offense of **SEXUAL EXPLOITATION OF A MINOR (O.C.G.A. 16-12-100(b)(5)) (FELONY)**, for that the said accused in the County of Richmond and State of Georgia, between the 1st day of October, 1995 and the 31st of October, 1995, did create a visual medium, to wit: a photograph, depicting a minor child engaged in sexually explicit conduct, to wit: a lewd exhibition of genitals, as shown in Exhibit lu, contrary to the laws of said State, the good order, peace and dignity thereof.


STATE'S
EXHIBIT
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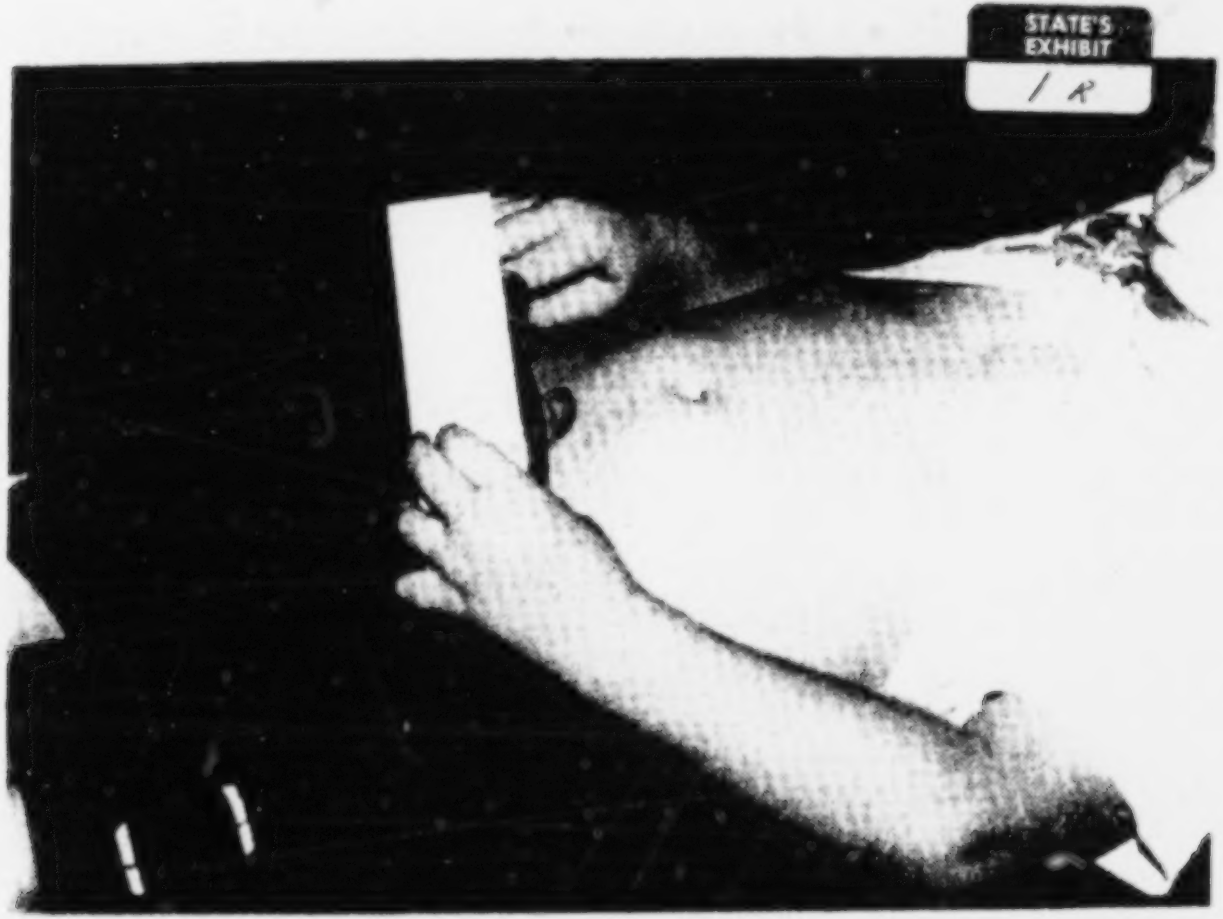
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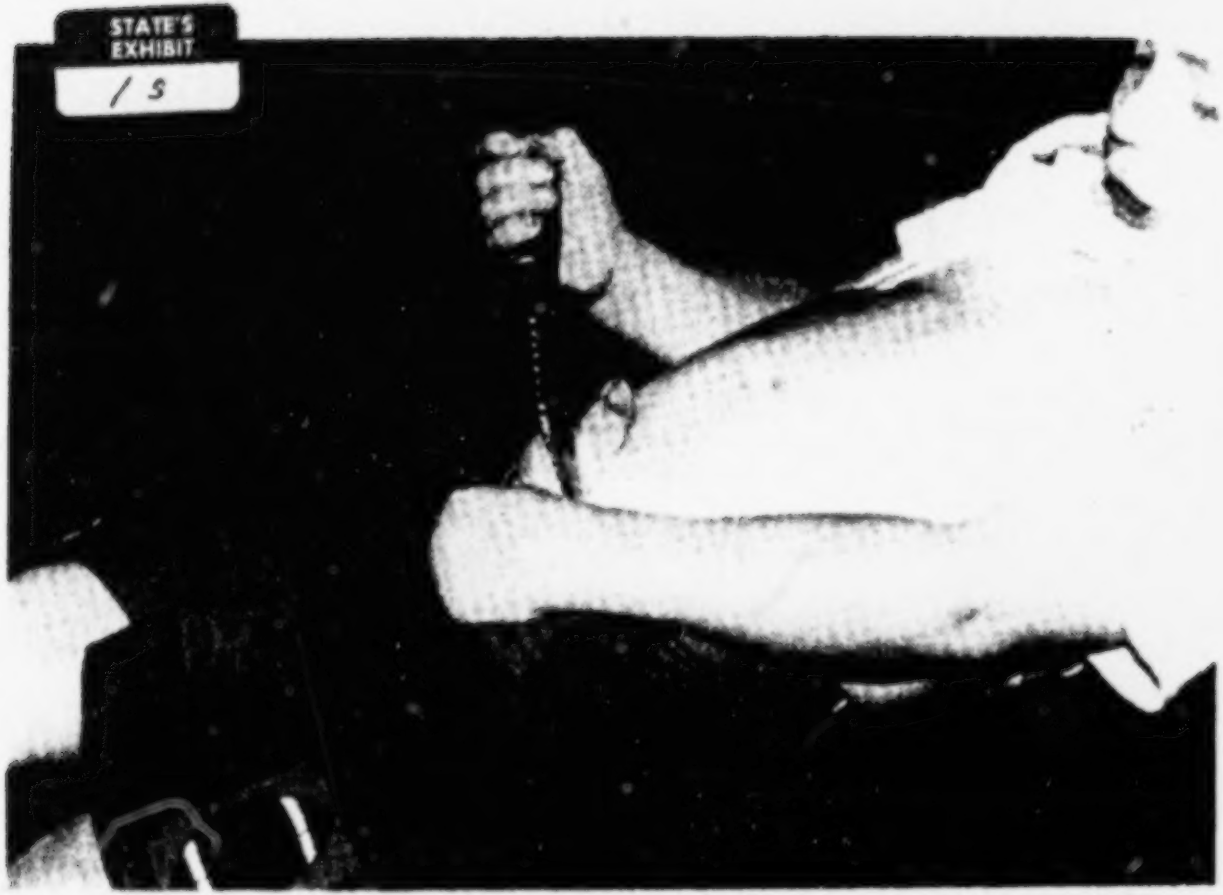
STATE'S
EXHIBIT
/ 5

STATE'S
EXHIBIT
17

Appendix J

THIRTIETH COUNT

The Grand Jurors aforesaid, chosen and sworn for the County of Richmond in the name and on behalf of the citizens of Georgia, further charge and accuse **ROBERT BRUCE CRAFT** with the offense of **SEXUAL EXPLOITATION OF A MINOR (O.C.G.A. 16-12-100(b)(5)) (FELONY),** for that the said accused in the County of Richmond and State of Georgia, between the 1st day of April, 1995 and the 31st of May, 1995, did create a visual medium, to wit: a photograph, depicting a minor child engaged in sexually explicit conduct, to wit: a lewd exhibition of genitals, as shown in Exhibit 2e, contrary to the laws of said State, the good order, peace and dignity thereof.

STATE'S EXHIBIT

2e

Appendix J

THIRTY-FIRST COUNT

The Grand Jurors aforesaid, chosen and sworn for the County of Richmond in the name and on behalf of the citizens of Georgia, further charge and accuse **ROBERT BRUCE CRAFT** with the offense of **SEXUAL EXPLOITATION OF A MINOR (O.C.G.A.1 6-12-100(b)(5)) (FELONY),** for that the said accused in the County of Richmond and State of Georgia, between the 1st day of April, 1995 and the 31st of May, 1995, did create a visual medium, to wit: a photograph, depicting a minor child engaged in sexually explicit conduct, to wit: a lewd exhibition of genitals, as shown in Exhibit 2f, contrary to the laws of said State, the good order, peace and dignity thereof.

STATE'S
EXHIBIT
2 F

Appendix J

THIRTY-SECOND COUNT

The Grand Jurors aforesaid, chosen and sworn for the County of Richmond in the name and on behalf of the citizens of Georgia, further charge and accuse **ROBERT BRUCE CRAFT** with the offense of **SEXUAL EXPLOITATION OF A MINOR (O.C.G.A. 16-12-100(b)(5)) (FELONY)**, for that the said accused in the County of Richmond and State of Georgia, between the 1st day of April, 1995 and the 31st of May, 1995, did create a visual medium, to wit: a photograph, depicting a minor child engaged in sexually explicit conduct, to wit: a lewd exhibition of genitals, as shown in Exhibit 2g, contrary to the laws of said State, the good order, peace and dignity thereof.

STATE'S
EXHIBIT
26

Appendix J

THIRTY-THIRD COUNT

The Grand Jurors aforesaid, chosen and sworn for the County of Richmond in the name and on behalf of the citizens of Georgia, further charge and accuse **ROBERT BRUCE CRAFT** with the offense of **SEXUAL EXPLOITATION OF A MINOR (O.C.G.A. 16-12-100(b)(5)) (FELONY)**, for that the said accused in the County of Richmond and State of Georgia, between the 1st day of April, 1995 and the 31st of May, 1995, did create a visual medium, to wit: a photograph, depicting a minor child engaged in sexually explicit conduct, to wit: a lewd exhibition of genitals, as shown in Exhibit 2h, contrary to the laws of said State, the good order, peace and dignity thereof.

STATE'S EXHIBIT

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Appendix J

THIRTY-FOURTH COUNT

The Grand Jurors aforesaid, chosen and sworn for the County of Richmond in the name and on behalf of the citizens of Georgia, further charge and accuse **ROBERT BRUCE CRAFT** with the offense of **SEXUAL EXPLOITATION OF A MINOR (O.C.G.A. 16-12-100(b)(5)) (FELONY),** for that the said accused in the County of Richmond and State of Georgia, between the 1st day of April, 1995 and the 31st of May, 1995, did create a visual medium, to wit: a photograph, depicting a minor child engaged in sexually explicit conduct, to wit: a lewd exhibition of genitals, as shown in Exhibit 2i, contrary to the laws of said State, the good order, peace and dignity thereof.

STATE'S
EXHIBIT
2 E

Appendix J

THIRTY-FIFTH COUNT

The Grand Jurors aforesaid, chosen and sworn for the County of Richmond in the name and on behalf of the citizens of Georgia, further charge and accuse **ROBERT BRUCE CRAFT** with the offense of **SEXUAL EXPLOITATION OF A MINOR (O.C.G.A. 16-12-100(b)(5)) (FELONY)**, for that the said accused in the County of Richmond and State of Georgia, between the 1st day of April, 1995 and the 31st of May, 1995, did create a visual medium, to wit: a photograph, depicting a minor child engaged in sexually explicit conduct, to wit: a lewd exhibition of genitals, as shown in Exhibit 2j, contrary to the laws of said State, the good order, peace and dignity thereof.

STATE'S EXHIBIT

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STATE'S
EXHIBIT
14

Appendix J

FORTY-FIRST COUNT

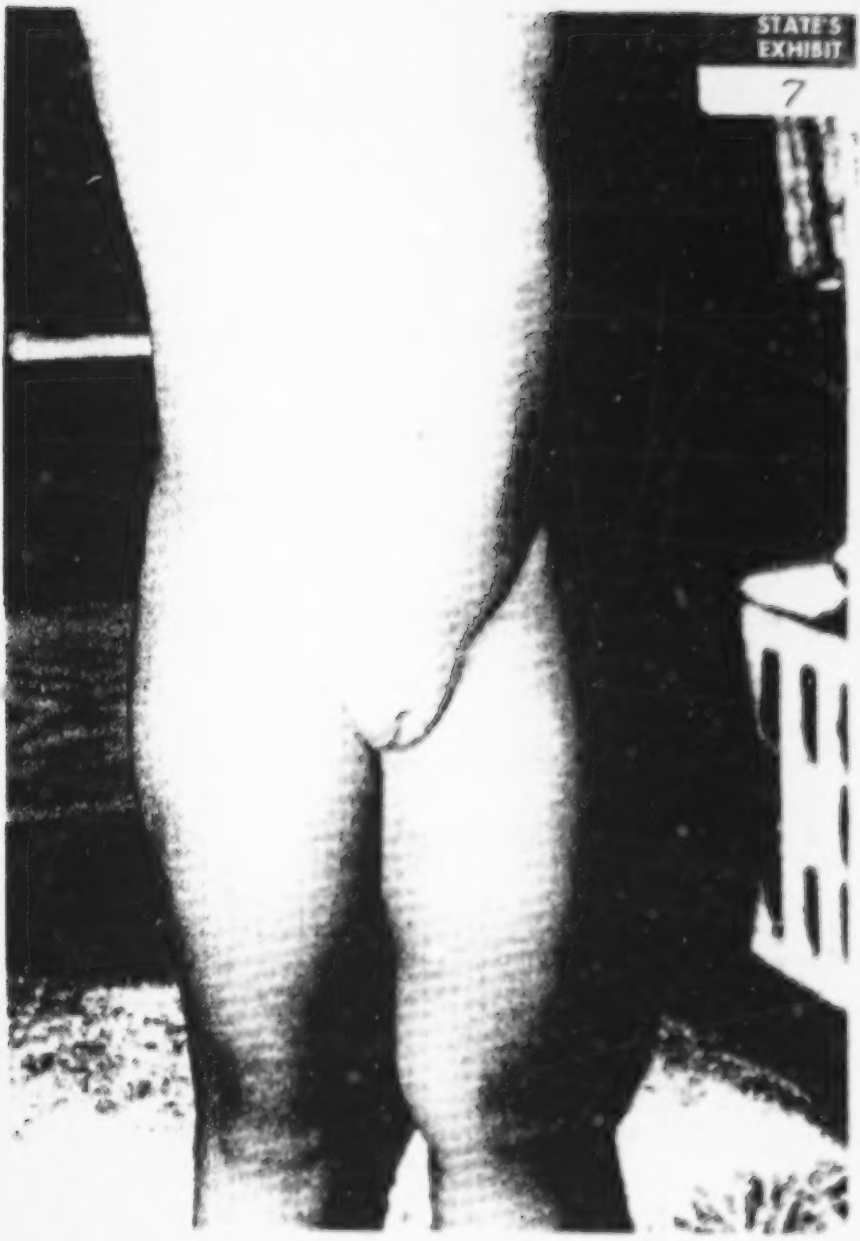
The Grand Jurors aforesaid, chosen and sworn for the County of Richmond in the name and on behalf of the citizens of Georgia, further charge and accuse **ROBERT BRUCE CRAFT** with the offense of **SEXUAL EXPLOITATION OF A MINOR (O.C.G.A. 16-12-100(b)(5)) (FELONY)**, for that the said accused in the County of Richmond and State of Georgia, between the 1st day of June, 1996 and the 30th day of June, 1996, did create a visual medium, to wit: a photograph, depicting a minor child engaged in sexually explicit conduct, to wit: a lewd exhibition of genitals, as shown in Exhibit 8, contrary to the laws of said State, the good order, peace and dignity thereof.

STATE'S
EXHIBIT
8

Appendix J

FORTIETH COUNT

The Grand Jurors aforesaid, chosen and sworn for the County of Richmond in the name and on behalf of the citizens of Georgia, further charge and accuse **ROBERT BRUCE CRAFT** with the offense of **SEXUAL EXPLOITATION OF A MINOR (O.C.G.A. 16-12-100(b)(5)) (FELONY)**, for that the said accused in the County of Richmond and State of Georgia, between the 1st day of June, 1996 and the 30th day of June, 1996, did create a visual medium, to wit: a photograph, depicting a minor child engaged in sexually explicit conduct, to wit: a lewd exhibition of genitals, as shown in Exhibit 7, contrary to the laws of said State, the good order, peace and dignity thereof.


STATE'S
EXHIBIT
7

APPENDIX K — DECLARATION OF KATHRYN S. CRAFT DATED JANUARY 22, 2004

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
AUGUSTA DIVISION

Case No. 103-144

28 U.S.C. § 2254
Habeas Corpus

Robert Bruce Craft,

Petitioner,

v.

Calvin D. Morton, Warden, James Donald, Commissioner, Department of Corrections,

Respondents.

DECLARATION OF KATHRYN S. CRAFT

I am the wife of Petitioner Robert Bruce Craft.

My husband was a prolific photographer. He took tens of thousands of photographs but selected very few for framing, mounting on posters or similar special treatment. Most he placed back in the developers' envelopes and left piled up about our home.

Appendix K

The photographs put into evidence at trial were selected from among those he left piled up around our home. (The exceptions were the series of photographs underlying Counts 69 and 70 of the Columbia County indictment, for which he was acquitted on appeal.)

The photographs attached as collective Exhibit A are typical of the photographs he selected for special treatment.

None of his photographs of children were sexual. The photographs for which he was convicted are similar to mainstream, non-sexual portrayals of children like those in the photographs attached as collective Exhibit B.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 22 day of January, 2004.

s/ Kathryn S. Craft
Kathryn S. Craft

EXHIBIT

A

Appendix K

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EXHIBIT

B

Appendix K

PARENTING

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The fastest growing segment of the country's homeless population: families with kids. Here, one mom and dad's struggle to survive BY MAGGIE JONES

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COVER CREDITS
Photograph by Deborah Feingold. Grooming by Jeffrey Gaviser/Mark Edward, Inc.

Appendix K

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Appendix K

FAMILY
reporter
NEWS • TRENDS • VOICES • VIEWS

Under Siege: The New School Drill

Last summer, while students were out on vacation, the faculty, staff, and a few students of a middle school in Grand Prairie, TX, participated in a four-hour mock-crisis drill. The exercise involved an actor camouflaged as an armed assailant, who held staff members "hostage" in the library until they were rescued. In Pierce County, WA, a deputy sheriff demonstrated to a crowd of teachers, administrators, and security workers from an elementary school how to escape from a gunman. School officials in Seattle and Dallas expanded their emergency-response plans to include similar scenarios, and Alaska, Kentucky, and Washington held statewide summits to talk about how schools should handle such emergencies. This summer, similar drills and workshops are expected to take place in schools across the country.

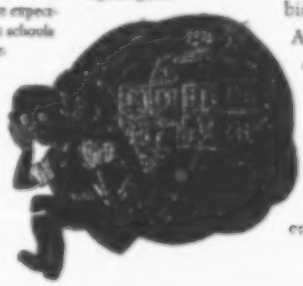
Responding to Tragedy
Partly motivated by the spate of school shootings that shocked the country a year ago, school districts are revising their crisis plans—which just a few years ago addressed only natural disasters—to include responses to gun-toting assailants, according to Ron Stephens, executive director of the National School Safety Center, in Westlake Village, CA. "The thinking used to be that school shootings would be a situation for the police to handle," he says. "Now school officials feel *they* need to know what to do in these emergencies."

A True Crisis?
Some experts, however, question whether such drills are effective—or even necessary. Vincent Schiraldi, director of the Justice Policy Institute, a Washington DC–based research and policy group, argues against spending tax dollars to prevent what he believes are exceedingly rare tragedies. "Children are twenty-three times more likely to be killed in a gun accident than by a school shooting," he says.
—KELLY KING ALEXANDER

Baby on the way? Keep weekdays free

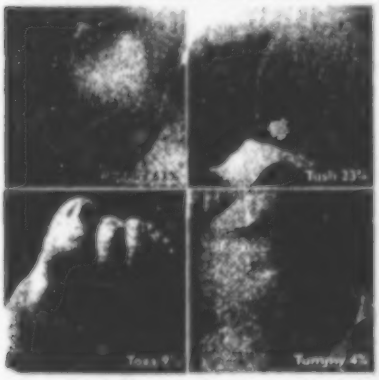
The Most Popular Birthdays

On which day of the week will your child be born? Tuesday's a pretty good bet. According to the National Center for Health Statistics (NCHS), 11,903 American babies were born on a Tuesday in 1996, more than on any other day. While Tuesdays were busiest, on weekends the birthrate noticeably dropped. According to the NCHS, this disparity results from the fact that cesareans and induced births are typically scheduled on weekdays, since most doctors prefer not to do them on weekends. — BRETT KENNEY



Appendix K

11 What is your baby's cutest body part?
Readers chose the cheeks—both front and rear.



12 In which aisle of the supermarket is your child most likely to throw a temper tantrum?

Candy aisle **42%** Cookie aisle **26%**
Cereal aisle **16%** Soda aisle **4%**

13 What's your child's favorite television show?

The purple dino edged out the blue pup. *Barney & Friends* is your kids' top show (21%). *Blue's Clues* (18%) follows, with *Rugrats* and *Teletubbies* tied for third (16%). In fact, kids love Barney so much that if they were stranded on an island and could watch only one video, it would be one of his.

14 Which kids' TV show do you love watching, too?

Arthur is the program parents tune in to the most (20%). *Blue's Clues* and *Sesame Street* tied as the top runners-up (14%). And while he may be the kids' fave, only 5% of parents love watching Barney.

15 Which common stage in your child's development do you wish you could have skipped?

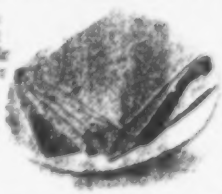
Tantrum throwing **39%** Not sleeping through the night **31%**
Potty training **14%** Picky eating **12%**

16 Ranking of the television characters you think your child would be most likely to choose to invite to a playdate:

1. Winnie the Pooh
2. Barney
3. The Teletubbies
4. Blue

17 You try to prepare healthy meals, but readers polled said their child's fantasy dinner is:

Cheese **29%**
Sour Patch Kids, M&M's, Oreos, and ice cream **16%**
Multicolored, sugar-coated cereal **21%**
Plain macaroni **17%**



18 What do you want your child to be when he grows up?

Readers must be buying those toy medical kits for their kids, since more than half chose doctor as the dream job for their child. Others fantasize about the occupations of best-selling novelist (19%) and pro athlete (13%)—with parents of boys more likely to give the latter answer. And it's no surprise that the President of the United States no longer seems like the top job: Only 3% of readers want to see their child working in the Oval Office someday.

Appendix K

PARADE

Photo Contest — Over $150,000.00 in Prizes

International Library of Photography to award 70 prizes to amateur photographers in coming months, including $1,000.00 Grand Prize

The International Library of Photography awards prizes to talented amateur photographers. This Grand Prize Winner by Linda Jackson of Texas won $1,000.00 and will be seen by millions of people.

Owings Mills, Maryland — The International Library of Photography has just announced its upcoming amateur photography competition. The contest is open to everyone and entry is free.

"We're looking to identify new and emerging talent in the field of photography," stated Jeffrey Bryan of The International Library of Photography. "We have a ten year history of awarding large cash prizes to talented amateur artists who have never before won any type of artistic contest."

The deadline for entry into the competition is May 15, 1998. Another contest begins May 16, 1998.

The International Library of Photography was founded to recognize and promote the artistic accomplishments of amateur photographers. Our libraries have awarded over $130,000.00 to talented artists in recent years.

Possible Publication

Many submitted photos will also be considered for publication by The International Library of Photography. Previous anthologies published by the organization include *A Question of Balance*, *The Other Side of the Mirror*, and *Cherished Moments in Time*, among others. These anthologies routinely sell out because they are truly enjoyable and are also a sought after sourcebook for artistic talent.

How to Enter

Anyone may enter this competition simply by sending ONLY ONE photograph in one of the following categories: People, Animals, Nature, Action, Humor, Portraiture, or Other. The photo must be a color or black and white print (unmounted), 8" x 10" or smaller, and should be sent to:

The International Library of Photography
Suite 101-5005
3600 Crondall Lane
Owings Mills, MD 21117

Be sure to include your name and address on the back of your photograph, as well as the category in which you wish to enter and the title of the photograph (photos cannot be returned). Entries must be postmarked by May 15, 1998.

"All photographers who enter will receive a response concerning their entries," indicated Bryan. "I hope you urge your readers to enter the contest. They could be our next big winner."

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Appendix K

potty training
WHAT WORKS

Twenty-two-month-old Ben would announce, with great fanfare, that he'd just pooped. Two-year-old Katie's business was more secretive. She'd scurry behind a chair with a furtive expression on her face. My own twin daughters, at 26 months, stumbled into the potty nine one day when they rummaged through their bureau drawer and discovered the pretty little panties I had tucked away for them. Instantly, they wanted to parade around in their big-girl underwear.

What do these kids have in common? They show growing awareness of bowel and bladder activity and even a flicker of interest in the case of my daughters. But none on exactly shows true signs of readiness for toilet training, according to Barbara Howard, M.D., assistant professor of pediatrics at the Johns Hopkins University School of Medicine in Baltimore and president of the Society for Developmental and Behavioral Pediatrics. Now that the toilet training debate has heated up again, thanks to experts sparring over the when and how of potty proficiency, Dr. Howard sets the record straight on what works, based on her own research and 26 years' experience counseling children and their families. In her carefully thought-out method, Dr. Howard explains why the learning process should start only when a child is absolutely ready and shows how it should unfold at a leisurely pace—in "kid time," as it were. Otherwise, problems can arise—from constipation to humiliation—when parents become potty pushers, she warns. That's a far cry from the controversial stance taken by author John Rosemond. "It's a slap to the human intelligence," he blustered in his syndicated column, to let a child go untrained beyond the age of 2. On top of that, he proposed that "naked and $75" is the best approach to take. In other words, let your child figure it out for himself when he pees down his leg, and after suffering through this phase, you pay for the carpets to be cleaned!

Potty mastery may be the messiest milestone, but with a little patience and applause plus a lot of structure, toilet training in your home can be—dare we say—flush with success and smiles. Research shows that once kids begin

BY CAROLYN HAGAN

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